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THE
ECCLESIASTICAL LAW

OF THE
Church of England.

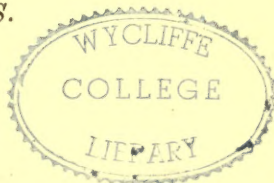
BY THE LATE
SIR ROBERT PHILLIMORE, Bart., D.C.L.,
OFFICIAL PRINCIPAL OF THE ARCHES COURT OF CANTERBURY;
MEMBER OF HER MAJESTY'S MOST HONORABLE PRIVY COUNCIL.

SECOND EDITION
BY HIS SON
SIR WALTER GEORGE FRANK PHILLIMORE, Bart., D.C.L.,
BARRISTER-AT-LAW;
CHANCELLOR OF THE DIOCESE OF LINCOLN, AND OFFICIAL OF THE ARCHDEACONRY OF COLCHESTER;
ASSISTED BY
CHARLES FUHR JEMMETT, B.C.L., LL.M.,
BARRISTER-AT-LAW.

"Episcopatus unus, cujus a singulis in solidum pars tenetur."—*De Unit. Eccles. St. Cypri.*
"More especially we pray for the good estate of the Catholic Church."—*English Prayer Book.*
"Certain it is, that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the justices of the temporal courts and the ecclesiastical judges, have kept themselves within their proper jurisdiction, without encroaching or usurping upon one another."—Lord Coke, 3 *Inst.* 321.

IN TWO VOLUMES.

Vol. I.



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PREFACE

TO THE SECOND EDITION.

THIS Second Edition incorporates a large amount of new material of Church Law, and especially from the year 1873 to the month of August, 1895.

All the Acts of Parliament bearing on Ecclesiastical Law, and all the judicial decisions on Ecclesiastical matters which have been reported in the Law Reports between these dates, will, it is believed, be found in their proper places.

Some information of older date, which had been omitted from the earlier edition, but which the Editor has found in the course of his reading, has been inserted.

In order to find room for this additional matter, it has been necessary to retrench some portions of the first edition which have in course of time become obsolete or of lesser importance, and to abridge some judicial decisions which had been given at length.

The references and quotations throughout the Book, in the original as well as in the new part, have been compared and verified throughout.

In order to make the Book practically useful, many cross references have been added ; and in a few instances the order of portions of the Book has been re-arranged.

In all other respects care has been taken to reproduce the original work, and especially to leave the statements made by the Author intact.

Where the Editor has added any expression of his own opinions, he has taken care that it should appear to rest upon no authority but his own.

WALTER GEORGE FRANK PHILLIMORE.

PREFACE

TO THE FIRST EDITION.

THE last edition of Dr. Burn's "Ecclesiastical Law" was edited by me in 1842.

Since that period many and important alterations have been made in that law.

The present Treatise incorporates considerable portions of Dr. Burn's Work, but it is framed upon a totally different model, and, while it contains a very large portion of entirely new matter, omits those subjects over which the Ecclesiastical Courts have ceased to exercise jurisdiction.

The dictionary form adopted by Dr. Burn, however superficially convenient, appears to me fatal to any attempt to produce the law in the form of a system arranged according to the principles of science.

No philosophical connection of parts,—no historical and legal development of principles is consistent with the alphabetical form; while the writer is compelled to resort to the imperfect, clumsy and wearisome makeshift of continual reference from one subject to another under different letters of the alphabet.

I have endeavoured in this Work to state the Ecclesiastical Law of that great branch of the Catholic Church, called the English Church, accurately; and to show at the same time that it is, with many imperfections—arising in great measure from the hasty and crude legislation of modern times—capable of being reduced to a system.

I hope that this attempt may be at least so far successful as to promote a more continuous and scientific study of Ecclesiastical Jurisprudence than has for a very long period of time been prevalent in this country.

ROBERT PHILLIMORE.

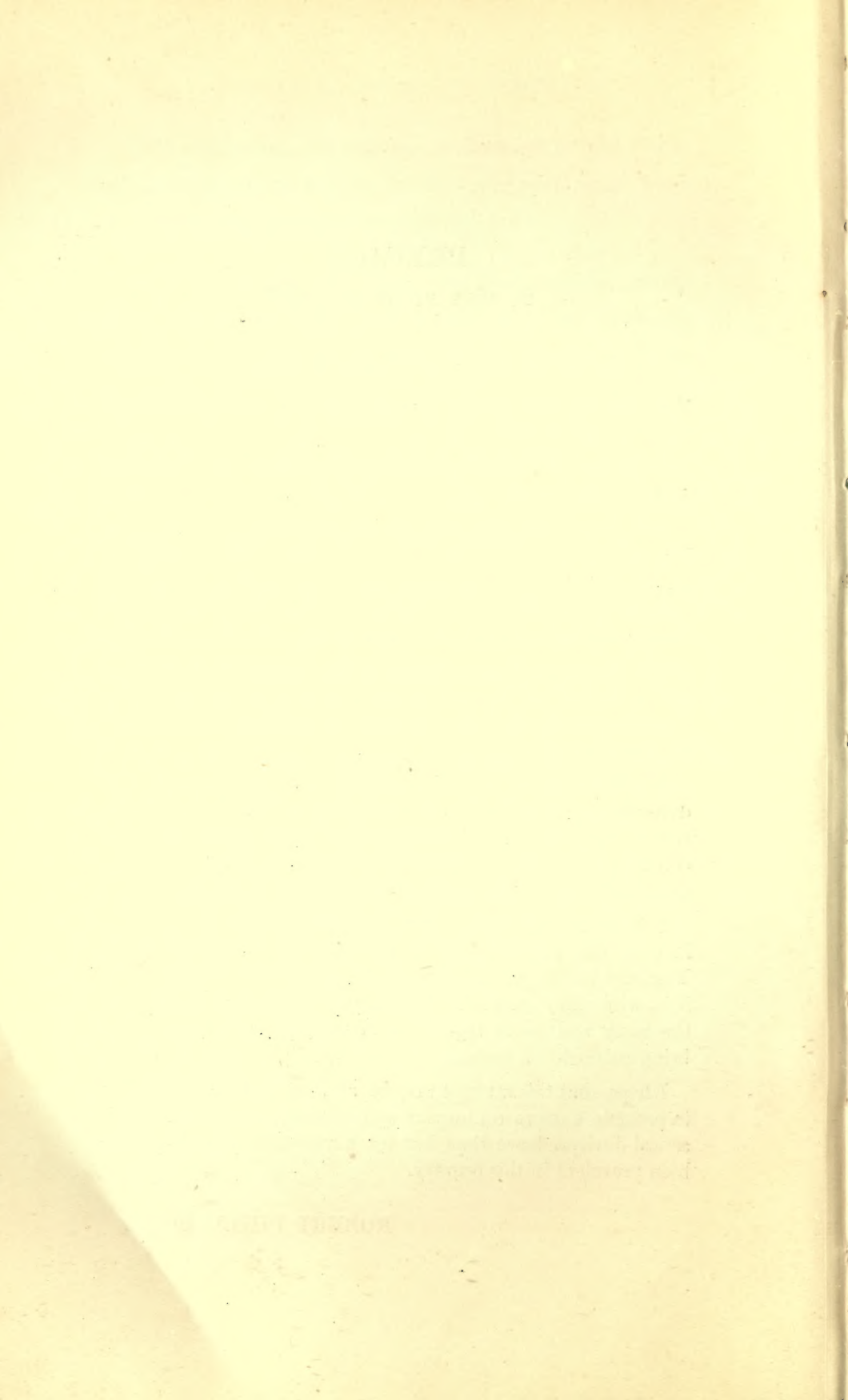


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AN

EXPLANATION OF THE REFERENCES

TO THE

BOOKS OF THE CANON LAW.



- Dist.* LXXVI. c. 2 Distinction the seventy-sixth and chapter the second of the first part of the *Decrees* of Gratian. And if a v. consonant, or this note be added, viz. §, it denotes the verse or paragraph of that chapter, as *Dist.* XVI. c. 2, v. 3, or § 3.
- 16 Q. 7, 3 That is to say, cause the sixteenth, question the seventh and chapter the third of the second part of the *Decrees* of Gratian.
- Con.* I. 2 Distinction the first and chapter the second of the third part of the *Decrees* of Gratian.
- X. i. 9, 6, 4 That is to say, book the first, title the ninth, chapter the sixth and paragraph the fourth of the *Decretals* of Pope Gregory the Ninth. The letter X. denoting the *Decretals* of that Pope.
- VI. iii. 4, 23 Book the third, title the fourth and chapter the twenty-third of the sixth book of the *Decretals* by Pope Boniface the Eighth.
- Clement.* II. 5, c. 2 Book the second, title the fifth and chapter the second of the *Clementines*.
- Extra.* 14, 3 That is to say, title the fourteenth and chapter the third of the *Extravagants* of Pope Joan the Twenty-second.
- Comm.* 3, 4 That is to say, book the third and chapter the fourth of the *Communes*.

All these books of the Canon Law are likewise sometimes quoted by the initial words of the law or chapter itself, and by the words of the title, as thus: *Ex specialis*, *Extra. de Judeis* that is to say, cap. 17, tit. 6, of the fifth book of *Gregory's Decretals*; for the word *Extra.* imports these *Decretals* as well as the *Extravagants*.



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[* These Canons are obsolete.]

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- 30 A further Act as to the proposed Bishopric of Bristol, the Bishopric of Bristol Act, 1894 (57 & 58 Vict. c. 21), has since been passed.
- 289 In *Keen v. Denny* (3 Ch., 1894, p. 169), Chitty, J., decided that, as between patrons of benefices with alternate turns of presentation, if one patron wrongfully usurp the turn of another, the order of turns of presentation is not thereby altered, but the ousted patron (after six months) loses his turn, and cannot requite himself by usurping against the other patron by way of retaliation; and that in this matter there is no distinction between usurpation by a stranger and usurpation by a person privy in or party to the title.
- 379 In *Keen v. Denny* (as above), Chitty, J., also held that a presentation on an exchange must be reckoned as a turn.
- 410 On the construction of sect. 14 of 23 & 24 Vict. c. 142, here given, see now the case of *Re Ecclesiastical Commissioners and New City of London Brewery Co., Limited* (1 Ch., 1895, p. 702), mentioned later in this work at p. 1410.
- 658 *Re Kerr* is now reported P., 1894, p. 284.
- 664 As to the circumstances in which the duty of maintaining a closed churchyard may be transferred from the churchwardens to the parish council under sect. 6 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), see later on in this work at p. 1466, where the section is given in full.
- 681 In *Regina v. The Vestry of St. Marylebone* (1 Q. B., 1895, p. 771), certain fees in respect of burials in the burial ground of that parish were applicable for the purpose (among others) of the repair of the parish church. The old burial ground having been closed, the burial board were holden liable, under sect. 36 of 15 & 16 Vict. c. 85, to apply the fees received by them in their new burial ground towards the repair of the church, as being a "parochial purpose" under that section. This case is cited on another point later on in the work at p. 1449.
- 693 The law as to the removal of monuments and stones when a churchyard is laid out as a garden under the Open Spaces Act, 1887 (50 & 51 Vict. c. 32), will be found later on in the work at p. 1413.
- 733 Another instance of the grant of a faculty for chancel gates is to be found in the case of *Vicar of St. James Norland v. Parishioners* (P., 1894, p. 256).
- „ In the case of *Vicar of St. John Pendlebury v. Parishioners* (P. (1895) p. 178), a faculty was granted for a reredos of a special nature.

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- 803 The Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37), s. 17, provides that, subject to and in the absence of notice, the holidays to be observed in a factory or workshop under sect. 22, sub-sects. 1 and 2, of the Factory and Workshop Act, 1878, shall be the whole of Christmas Day and Good Friday, and of every Bank-holiday.
- 1125 The Chancery Division will, in a suitable case, authorize the application of purchase-money of glebe taken by a railway company in the redemption of terminable rent-charges on the glebe, created under the Improvement of Land Act, 1864. (*Ex parte Vicar of Castle Bytham*, and *Ex parte Midland Railway Co.*, 1 Ch. 1895 p. 348.)
- 1221 The provisions of sub-sects. 2 and 3 of sect. 8 of the Tithe Act, 1891 (54 & 55 Vict. c. 8), were applied in the case of *Regina v. Commissioners of Taxes for Barstaple* (2 Q. B. 1895 p. 123), in which case the owner of the tithe rent-charge appealed against an alleged under-valuation of the land liable to such rent-charge.
- 1231 Another local Act for the commutation of tithes in a parish in the City of London is 7 Geo. 4, c. liv, referred to later in this work at p. 1688.
- 1354 As an instance of a charge on glebe for drainage, see *Ex parte Vicar of Castle Bytham*, and *Ex parte Midland Railway Co.* (1 Ch. 1895 p. 348), already referred to in these Addenda.

ERRATA.

- 625 1602, *read* 1603.
- 1312 8 Vict. c. 18, *read* 8 & 9 Vict. c. 18.
- 1317 8 Vict. c. 18, *read* 8 & 9 Vict. c. 18.
- 1330 38 & 39 Vict. c. 61, *read* 38 & 39 Vict. c. 92.
- 1353 28 Vict. c. 42, *read* 28 & 29 Vict. c. 42.
- 1695 28 Vict. c. 42, *read* 28 & 29 Vict. c. 42.

ECCLESIASTICAL LAW.

PART I.

INTRODUCTORY.

CHAPTER I.

THE CHURCH GENERALLY.

THE Church (*a*) is a society of men instituted for the worship of God, bound together by the profession of a common faith, the practice of divinely ordained rites, and resting upon a visible external order. “The Church.”

Such a society was unknown to heathen antiquity, and is the peculiar creature of christianity.

Heathen antiquity had a priesthood, but not a church. Its religion was inseparably interwoven with the civil life and municipal law of the citizen (*b*). Its creed was not a regular system of doctrine directly affecting practice, but a variety of incoherent legends and traditions mingled with remnants of divine revelations, more or less believed by the people.

Christianity is inseparable from a community, in which it imparts its truths by regular course of instruction, and endeavours to secure the observance of its precepts by a moral and religious education; and being a revelation of the will of God is necessarily independent of municipal institution, and unconfined by the limits of places or kingdoms.

The Church of Christ ought to be, and once was, like the robe of its Blessed Founder, and, like its faith, one. Divisions in the Church. But in the lapse

(*a*) *Lehrbuch des Kirchenrechts aller christlichen Confessionen von Ferdinand Walter* (14th ed.), Bonn, 1871. A work of great knowledge and research—perhaps the best compendium of ecclesiastical law extant. The author has, however, an imperfect notion of the *status* of the English Church—and does not

avoid the error of considering the terms “Roman” and “Catholic” as convertible.

(*b*) “*Publicum jus in sacris, in sacerdotibus, in magistratibus consistit . . . veluti erga Deum religio, ut parentibus et patriæ pareamus.*” *Dig. lib. I. tit. 1, l. 1, 2.*

of time various errors have been introduced from various causes into the faith and practice of the Primitive Apostolic Church. This unity has been broken, and various communities of christians have formed separate churches.

The great separation of the Eastern and Western Churches, originally caused by the arrogance, ambition and un-catholic conduct of Rome, remains from the same cause not only unhealed up to the present day, but aggravated by the new dogmas which Rome has recently promulgated, founded upon a new theory of development which shakes the stability of all christian faith.

From like causes came the independence of our branch of the catholic church in England, Ireland, and Scotland, and their offshoots in the United States of America, in India, in the British colonies, and in heathen lands, and of the imperfectly constituted Churches of the Protestants (c).

From a like cause it seems probable that an independent Episcopal Church will be formed in Germany by those who, holding fast to the ancient doctrine of the church and rejecting the novelties of the last Roman Council, adopt the title of "Old Catholics" and avoid the error and confusion generated by the ambiguous title of Protestant (d).

(c) "Patet non dari universalem Ecclesiam Protestantium sed plures particulares Protestantium Ecclesias; sola enim unio in eandem fidem, quæ liberi assensus est, ad illam non sufficit, sed requiritur unio in unam eandemque societatem." Boehmer, *Inst. tit. 1, § 6*, not.; Walter, *Lehrbuch, ubi supra*. "Si jamais les Chrétiens se rapprochent comme tout les y invite, il semble que la motion doit partir de l'Eglise de l'Angleterre." De Maistre, *Considérations sur la France*, ch. ii.

(d) The Church of Ireland since its disestablishment has in some measure avoided a name which would imply that it was a sect

rather than a branch of the Church. The preamble to their canons of 1871 is as follows:—"Whereas it "is expedient to amend the canons "of the Church of Ireland, &c. . . . "That the canons hereinafter expressed and enacted and none "other shall henceforth have full "force and effect as the canons of "the Church of Ireland." The preamble to the constitution of the Church passed in 1870 speaks of "we the archbishops and bishops of this the ancient Catholic and Apostolic Church of Ireland," but speaks afterwards of it as "a Reformed and Protestant Church," rejecting innovations upon the Primitive Faith.

CHAPTER II.

CHARACTER AND STATUS OF THE CHURCH OF ENGLAND.

THE Church of England requires her members to believe in "one Holy Catholic Apostolic Church," or "one Catholic and Apostolic Church" (*a*). A very grave and carefully considered manifesto, put forth in March, 1851, at the time of the last papal aggression, on her behalf by two archbishops and twenty bishops of England, distinctly declared "the undoubted identity of the church before and after the Reformation" (*b*): and that at this epoch she purged herself from certain corruptions and innovations of Rome, and established "one uniform ritual," but "without in any degree severing her connexion with the ancient Catholic Church." So also at the time of the foundation of the Anglican Bishopric of Jerusalem, the Archbishop of Canterbury gave the new bishop a "letter commendatory" to the "right reverend our brothers in Christ, the prelates and bishops of the ancient and apostolic churches in Syria, and the countries adjacent"; and in an explanatory statement published by authority, it was declared to be the duty of the new bishop to "establish and maintain, as far as in him lies, relations of christian charity with other churches represented at Jerusalem, and in particular with the Orthodox Greek Church" (*c*).

Belief in the
Catholic
Church.

In 1867, eight primates and sixty-eight bishops assembled from all parts of the globe, under the presidency of the metropolitan of Canterbury.

The resolutions of this conference were prefaced by the following introduction:

"We, bishops of Christ's Holy Catholic Church, in visible communion with the United Church of England and Ireland, professing the faith delivered to us in holy scripture, maintained by the primitive church, and by the fathers of the English reformation, now assembled, by the good providence of God, at the Archiepiscopal Palace of Lambeth, under the presidency of the primate of all England, desire, first, to give hearty thanks to Almighty God for having thus brought us together for common counsels and united worship; secondly, we desire to express the deep sorrow with which we view the divided condition of the flock of Christ throughout the world, ardently

(*a*) Apostles' and Nicene Creeds,
English Prayer Book.

(*b*) 2 Phill. Intern. Law, § ccccxxx.
The Guardian, April 2nd, 1851.

(*c*) 2 Phill. Intern. Law, § ccccxxii.

longing for the fulfilment of the prayer of our Lord, 'That all may be one, as Thou, Father, art in me, and I in thee, that they also may be one in us, that the world may believe that thou hast sent me'; and, lastly, we do here solemnly record our conviction that unity will be most effectually promoted by maintaining the faith in its purity and integrity, as taught in the holy scriptures, held by the primitive church, summed up in the creeds, and affirmed by the undisputed general councils."

Episcopacy.

As the Church of England is catholic, the cardinal point of her constitution is necessarily her episcopal government, in accordance with the doctrine and usage of the primitive Catholic Church. When the bishop is ordained or consecrated (c), "The archbishop and bishops present shall lay their hands upon the head of the elected bishop kneeling before them upon his knees, the archbishop saying, 'Receive the Holy Ghost, for the office and work of a bishop in the Church of God, now committed unto thee by the imposition of our hands; In the name of the Father, and of the Son, and of the Holy Ghost. Amen. And remember that thou stir up the grace of God which is given thee by this imposition of our hands: for God hath not given us the spirit of fear, but of power, of love, of soberness.'"

"It was (Hooker says) the general received persuasion of the ancient christian world, that *Ecclesia est in Episcopo*, the outward being of a church consisted in the having of a bishop" (d).

So the statute of Provisors (25 Edw. III. st. 4) speaks of "The Holy Church of England founded in the estate of prelacy within the realm of England."

A clear perception of the fact, that the Holy Church of England is founded on the estate of prelacy, is indispensable to an accurate understanding of her whole system and of the law by which the various parts of it are governed and maintained. In illustration of this position many instances might be averred. In this place,—the subject being dealt with at length hereafter,—it will suffice to mention two. First, the Church of England does not recognize the validity of holy orders unless conferred by an episcopal hand, and does always recognize them when so conferred. Consistently with this theory she does not in practice re-ordain the clerk who, having been ordained by a Roman bishop, leaves the Church of Rome and desires to officiate in the Church of England. Nor can there be any doubt that the Church of England recognizes the validity of the orders conferred by the Greek Church.

Secondly, the bishop of the Church of England has an un-examinable (e) authority to refuse ordination to any person

(c) The form of ordaining or consecrating a bishop is a portion of the Book of Common Prayer, and has therefore received the sanction of the church and the legal autho-

rity of parliament.

(d) Hooker, *Eccles. Pol.*, book VII., c. 5.

(e) *Rex v. Archbishop of Dublin*, 1 Alcock & Napier, p. 244.

presented to him. No rights of royal, lay, or ecclesiastical patronage are allowed to interfere with the exercise of this power always inherent in the episcopal office.

The Church of England is often called Protestant in common speech, and in some acts of parliament since the beginning of the eighteenth century. The sovereign at his coronation swears to maintain the "Protestant Reformed Religion established by law," and the crown is by law to descend in the "Protestant Line," but "whosoever shall come to the possession of this crown shall join in communion with the Church of England as by law established."

The term
Protestant.

So in the statutes relating to the union of Great Britain and Ireland it was provided, "that the Churches of England and Ireland as now by law established be united into one Protestant Episcopal Church, to be called the United Church of England and Ireland, and that the doctrine, worship, discipline and government of the said united church shall be and shall remain in full force for ever as the same are now established for the Church of England." So the Protestant Episcopal Church in Scotland, and the Protestant Episcopal Church in the United States of America are spoken of in various statutes (*f*). The 26 Geo. III. c. 84, is wiser in its language, and speaks of "Citizens of countries out of his majesty's dominions" "who profess the public worship of Almighty God according to the principles of the Church of England."

The expression Protestant is of foreign origin and obviously wanting in legal accuracy and logical precision; for in one sense the synagogue of the Jew and the assembly of the Unitarian are Protestant. It has not been adopted by the church herself in any formulary; but, as explained by the surrounding expressions and limitations in certain statutes which, since William the Third's reign, have adopted it, the name merely expresses, as the Constitutions of Clarendon, the Statutes of Provisors and of Premunire had expressed before the Reformation, the independent national existence of the Church of England, and her distinct position from that of the Church of Rome, and certainly does not express any identity of position or of doctrine between the Church of England and general foreign Protestantism, as such (*g*).

Indeed, the visible fabric of our old churches illustrates not inaptly the identity of the church in her spiritual aspect before and after the Reformation. They have been preserved, reformed and cleansed, so as to conform in material respects with the pattern of the primitive churches; the face has been washed, but the features are the same.

(*f*) 3 & 4 Vict. c. 33, now repealed; 5 Vict. c. 6.

(*g*) Thus Lutherans have been formally decided to be in the category of Protestant Dissenters,

and as such to be entitled to the protection of the Toleration Act. *Rea v. Hube*, Peake, Ca. p. 132; *S. C.*, 5 T. R. p. 542.

Church
established
in England.

The primitive church is in England (*h*) established by law as the church of the state. The state controls and protects her temporal condition and possessions. The sovereign is supreme over all courts and causes ecclesiastical as well as civil. The statute of Hen. VIII. (*i*) expresses in admirable language, and with historical and constitutional truth, the manner in which this control, protection, and supremacy are exercised.

The sycophants of this monarch, however, allowed the supremacy to the crown as absolutely as it had been formerly claimed by the Pope, and gave ground for the accusation that they ascribed to him spiritual power and functions as head of the church. Therefore, Bishop Jewell tells Bullinger, in a letter dated May, 1559, "that the queen (Elizabeth) would not be styled 'Head of the Church of England,' giving this grave reason thereof, that that was a title due to Christ only and to no mortal creature besides" (*k*).

The true account of the supremacy is to be found in the following authorities.

King's
supremacy by
common law.

Lord Chief Justice Hale says: "The supremacy of the crown of England in matters ecclesiastical is a most indubitable right of the crown, as appeareth by records of unquestionable truth and authority" (*l*).

Lord Chief Justice Coke says: "By the ancient laws of this realm, this kingdom of England is an absolute empire and monarchy, consisting of one head, which is the king, and of a body compact and compounded of many and almost infinite, several, and yet well-agreeing, members, all which the law divideth into two several parts, that is to say, the clergy and laity, both of them next and immediately under God subject and obedient to the head" (*m*).

By the parliament of England in 16 Rich. II. c. 5, it was asserted, that "the crown of England hath been so free at all times that it hath been in no earthly subjection, but immediately subject to God in all things touching the regality of the same crown, and to none other."

—by statute.

And in 24 Hen. VIII. c. 12, it is thus recited: "Where by divers sundry old authentick histories and chronicles it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same; unto whom a body politic, compact of all sorts and degrees of people, divided in terms, and by names of spiritualty and temporality, been bounden and owen to bear next to God a natural and humble obedience; he being also institute and furnished by the goodness and sufferance of

(*h*) The established church in Scotland has been Presbyterian since the reign of William III. There is now no established church in Ireland.

(*i*) 24 Hen. VIII. c. 12.

(*k*) Strype, Annals of the Reformation, vol. I., p. 195, c. 10.

(*l*) 1 Hale, P. C. p. 75.

(*m*) *Cawdrey's case*, 5 Co. p. 8.

Almighty God, with plenary, whole and entire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice and final determination to all manner of folk resiants or subjects within this his realm, in all causes, matters, debates, and contentions, happening to occur, insurge, or begin within the limits thereof without restraint or provocation to any foreign princes or potentates of the world."

Again in 25 Hen. VIII. c. 21: "This, your Grace's realm, recognizing no superior under God, but only your Grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made and obtained within this realm for the wealth of the same, or to such other as, by sufferance of your Grace and your progenitors, the people of your realm have taken at their free liberty by their own consent to be used amongst them, and have bound themselves by long use and custom to the observance of the same, not as to the observance of the laws of any foreign prince, potentate or prelate, but as to the customed and ancient laws of this realm, originally established as laws of the same by the said sufferance, consents and custom, and none otherwise."

In the Canons of 1603, can. 1. "As our duty to the king's most excellent majesty requireth, we first decree and ordain, that the archbishop from time to time, all bishops, deans, archdeacons, parsons, vicars, and all other ecclesiastical persons, shall faithfully keep and observe, and as much as in them lieth shall cause to be observed and kept of others, all and singular laws and statutes made for restoring to the crown of this kingdom, the ancient jurisdiction over the state ecclesiastical, and abolishing of all foreign power repugnant to the same. Furthermore, all ecclesiastical persons having cure of souls, and all other preachers, and readers of divinity lectures, shall to the uttermost of their wit, knowledge and learning, purely and sincerely (without any colour or dissimulation) teach, manifest, open and declare, four times every year at the least, in their sermons, and other collation and lectures, that all usurped and foreign power (forasmuch as the same hath no establishment nor ground by the law of God) is for most just causes taken away and abolished, and that therefore no manner of obedience or subjection within his majesty's realms and dominions is due unto any such foreign power; but that the king's power, within his realms of England, Scotland and Ireland, and all other his dominions and countries, is the highest power under God, to whom all men, as well inhabitants as born within the same, do by God's laws owe most loyalty and obedience, afore and above all other powers and potentates in the earth."

—by the
canons of the
Church.

Can. 2. "Whoever shall affirm, that the king's majesty hath not the same authority in causes ecclesiastical, that the godly kings had amongst the Jews, and Christian emperors of the primitive church, or impeach any part of his regal supremacy in the said causes restored to the crown, and by the laws of this

realm therein established; let him be excommunicated *ipso facto*, and not restored but only by the archbishop, after his repentance and public revocation of those his wicked errors."

By can. 26, as it stood till altered in 1865, "No person was to be received into the ministry, nor admitted to any ecclesiastical function, without subscribing (amongst others) to this article following: that the king's majesty under God is the only supreme governor of this realm, and of all other his highness's dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state, or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence, or authority, ecclesiastical or spiritual, within his majesty's said realms, dominions and countries."

—by the
Thirty-nine
Articles.

In the Articles (Art. 37), "The queen's majesty hath the chief power in this realm of England, and other her dominions; unto whom the chief government of all estates of this realm, whether they be ecclesiastical or civil, in all causes doth appertain; and is not, nor ought to be, subject to any foreign jurisdiction. Where we attribute to the queen's majesty the chief government . . . we give not to our princes the ministering either of God's word or of the sacraments; . . . but that only prerogative which we see to have been given always to all godly princes in Holy Scripture by God himself; that is, that they should rule all estates and degrees committed to their charge by God, whether they be ecclesiastical or temporal, and restrain with the civil sword the stubborn and evil doers. The Bishop of Rome hath no jurisdiction in this realm of England."

Penalty of
denying the
supremacy.

By 1 Eliz. c. 1, s. 7, it is enacted "that no foreign prince, person, prelate, state, or potentate spiritual or temporal, shall . . . use, enjoy or exercise any manner of power, jurisdiction, superiority, authority, pre-eminence or privilege, spiritual or ecclesiastical, within this realm, or within any other your majesty's dominions or countries; . . ." but "the same shall be clearly abolished out of this realm and all other your Highness' dominions for ever: any statute, ordinance, custom, constitutions, or any other matter or cause whatsoever to the contrary in anywise notwithstanding."

Sect. 8. "Such jurisdictions, privileges, superiorities and pre-eminences spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority have heretofore been, or may lawfully be exercised or used for the visitation of the ecclesiastical state and persons, and for reformation, order and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts and enormities, shall for ever, by the authority of this present Parliament, be united and annexed to the imperial crown of this realm."

Statutory
definition
of the
supremacy.

At the great epochs also of the Revolution, and of the unions of Scotland and Ireland, the supremacy of the crown was limited and defined. The suspending power claimed by James II. was

pronounced illegal (*n*), and a coronation oath enacted which is to be administered by one of the archbishops or bishops to the sovereign, who must swear to govern the people according to the statutes in parliament agreed on, and the laws and customs of the kingdom, to maintain the religion established by law, and preserve the rights and privileges of the bishops and clergy (*o*).

This supremacy was further defined by the oath of allegiance and supremacy as set forth in 21 & 22 Vict. c. 48, s. 1. "I, A. B., do swear that I will be faithful and bear true allegiance to her majesty queen Victoria, and will defend her to the utmost of my power against all conspiracies and attempts whatever which shall be made against her person, crown or dignity, and I will do my utmost endeavour to disclose and make known to her majesty, her heirs and successors, all treasons and traitorous conspiracies which may be formed against her or them; and I do faithfully promise to maintain, support and defend, to the utmost of my power, the succession of the crown, which succession, by an act intituled 'An Act for the further limitation of the crown, and better securing the rights and liberties of the subject,' is and stands limited to the princess Sophia, electress of Hanover and the heirs of her body being protestants, hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the crown of this realm; and I do declare that no foreign prince, person, prelate, state or potentate hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within this realm: and I make this declaration upon the true faith of a christian. So help me God."

This oath, however, has been again altered by 31 & 32 Vict. c. 72; and now the oath of allegiance is as follows: "I, —, do swear that I will be faithful and bear true allegiance to her majesty queen Victoria, her heirs and successors, according to law. So help me God."

(*n*) 1 W. & M. sess. 2, c. 2.

(*o*) 1 W. & M. c. 6; 6 Ann. cc. 8, 11.

CHAPTER III.

JUS ECCLESIASTICUM.

What this is. THE rules and laws which relate to the ministrations and government, rights and obligations of a church established in a state are properly denominated *jus ecclesiasticum*; under which head are included, not only the canons and ordinances made by ecclesiastical authority, but also the civil laws and the customs, general and local, which affect the church, and which cannot with strict propriety be included under the usual title *jus canonicum*.

This observation applies with particular force to the law of the English Church; for in England the law of the church and the state are, with few exceptions, the same.

Law by which
the church is
governed.

Jus ecclesiasticum admits of various divisions: considered as to its origin, it is either divine or human, modern or recent: as canonists say, *antiquum, novum, novissimum*: considered as to its object, it is either public or private.

(1.) *Jus publicum ecclesiasticum* determines the authority of the universal church and those who govern it. (2.) *Jus privatum ecclesiasticum* is concerned with the rights and duties of individual members of the church. *Jus publicum* also admits of a subdivision into internal and external:—the former being concerned with the constitution of the church relatively to the members of it; the latter being concerned with the relations of the church to the state and to other religious bodies not directly connected with herself.

The rights and duties arising from these latter relations will be discussed in later chapters (*a*): the former relations, viz., those arising from the union of the church with the state, will be considered in connection with the exposition of the law which governs each institution or function of the church.

(*a*) Vide *infra*, Part X.

CHAPTER IV.

THE SOURCES OF THE LAW OF THE CHURCH OF ENGLAND.

AN examination of the laws by which the Church of England is governed leads to two certain conclusions:—

1. That she has adhered in all matters of importance to the general principles of the law of the Eastern and Western Church.

General principles of the law of the Church of England.

2. That she has at all times before and since the Reformation claimed the right of an independent church in an independent kingdom, to be governed by the laws which she has deemed it expedient to adopt.

In the case of *Martin v. Mackonochie* (a) the judge of the Court of Arches said as follows:—"In the history of no kingdom is the independence of the national church written with a firmer character than in that of England, in the statutes of the realm, in the decisions of judicial tribunals, and the debates of parliament.

"The Constitutions of Clarendon, in Henry the second's reign (A.D. 1164), though directly aimed at the repression of the inordinate claims and privileges of the national church, were, no doubt, indirectly 'calculated,' as Hume observes, 'to establish the independency of England on the papacy;' and, therefore, when the king sought Pope Alexander's ratification of them, that pontiff annulled and rejected all but six out of the sixteen memorable articles.

"The resistance of Beckett, and, still more, the general feeling excited by the wicked and impolitic murder of that prelate, procured the practical abrogation of the articles objected to, by the enactments of Edw. I. and III., of Rich. II., of Hen. IV. and V., and of Edw. IV.

"But in the severe penalties attached to the statutes of provisors and *præmunire* may be read the steady determination of the English people to maintain an independent national church, and to resist the ultramontane doctrines which had taken root in some other countries.

"The Statute of Provisors (25 Edw. III., st. 6 (b), A.D. 1350) recites that 'the Holy Church of England' was founded in the 'estate of prelacy within the realm of England' by the king

(a) L. R., 2 Adm. & Eccl. p. 116, at pp. 150—155.

(b) 25 Edw. 3, st. 4, in "The Statutes Revised."

and nobles of England, and forbids the prevalent abuses of the pope's bestowing benefices upon aliens, 'benefices of England which be of the advowry of the people of Holy Church,' the reservation of first-fruits to the pope, and the provision or reservation of benefices to Rome. By 38 Edw. III. st. 2, c. 1 (A.D. 1363), persons receiving citations from Rome in courts pertaining to the king, &c., are liable to the penalty of 25 Edw. III.

"The statute (A.D. 1392) 16 Rich. II. c. 5, renders the procuring of bulls from Rome liable to *præmunire*, and it recites a variety of papal aggressions upon the privileges of the crown; among other matters, as to the translation of bishops out of the realm; or from one bishopric to another within the realm; and the carrying of treasure out of the realm; and so the realm, destitute as well of counsel, as of substance, to the final destruction of the said realm, and so the crown of England, which hath been so free at all times that it hath been in no earthly subjection, but immediately subject to God in all things touching the regality (*la regalie*) of the same crown, and to none other, should be submitted to the pope, and the laws and statutes of the realm by him defeated and avoided at his will, in perpetual destruction of the sovereignty of the kingdom of the king and lord, his crown, his royalty, and of all his realm, which God defend.

24 Hen. VIII.
c. 12.

"This statute before the Reformation and the subsequent enactment of 24 Hen. VIII. c. 12, and the great case of *Cawdry (c)*, as reported by Lord Coke and corrected by Bishop Stillingfleet, may be said to contain a treatise on constitutional law of England upon the subject of the usurpation of the papal see upon the liberties of the national church, and in regard to the authority and privilege of the English crown. It would be difficult to conceive a clearer or more dignified exposition of the law upon this subject than is contained in the prefatory part of the statute of Hen. VIII., 'Where by divers sundry old authentick histories and chronicles it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of the imperial crown of the same; unto whom a body politic, compact of all sorts and degrees of people, divided in terms, and by names of spirituality and temporality, been bounden and owen to bear next to God a natural and humble obedience; he being also institute and furnished, by the goodness and sufferance of Almighty God, with plenary, whole and entire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice and final determination to all manner of folk, resiants or subjects within this his realm, in all causes, matters, debates, and contentions, happening to occur, insurge, or begin within the limits

(c) 5 Co. p. 1. Stillingfleet, *Ecclesiastical Jurisdiction*, vol. II., Eccl. Cas., "Of the Foundation of p. 49.

thereof, without restraint or provocation to any foreign princes or potentates of the world; the body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpreted, and showed by that part of the said body politic called the spirituality, now being usually called the English Church, which always hath been reputed, and also found of that sort, that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour sufficient, and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties as to their rooms spiritual doth appertain; for the due administration whereof, and to keep them from corruption and sinister affection, the king's most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said church both with honour and possessions; and the laws temporal for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace, without rapine or spoil, was and yet is administered, adjudged, and executed by sundry judges and ministers of the other part of the said body politic, called the temporality; and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other.'

"At the period of the Reformation the national church introduced an express denial of the authority of the pope,—henceforth called in all public acts and documents the Bishop of Rome,—into her articles and canons, and an acknowledgment of the temporal supremacy of the crown over the ecclesiastical as well as the civil state. Henry VIII. was excommunicated, and in the bull his subjects were commanded to renounce their allegiance, and the nobles were ordered '*sub ejusdem excommunicationis ac perditionis bonorum suorum pœnis*,' to unite with all christian princes in expelling Henry from England. Elizabeth was excommunicated in pretty similar terms, but not until twelve years after her accession. In answer to a request from the emperor and other Roman Catholic princes, that she would allow the Roman Catholic places of worship, she replied that she would not allow them to keep up a distinct communion, alleging her reasons in these remarkable words, 'for there was no new faith propagated in England; no religion set up but that which was commanded by our Saviour, practised by the primitive church, and unanimously approved by the fathers of the best antiquity.' The Roman Catholics, both in England and Ireland, appear to have outwardly conformed to the services of the church for about ten years.

Denial of
papal authority.

"The peculiar character of the English people and the English Church is also strongly shown in their determination not to admit the general body of the canon law into these realms, but only such portions of it as were consistent with the constitution,

Provincial
constitutions.

the common law and the peculiar usages of the Anglican church. The rules of the general canon law were principally introduced into this country, and considerably modified in their introduction, through the medium of provincial constitutions passed by the authority of the metropolitans of England. It is true that the pope endeavoured to maintain his authority in this matter by sending legates from time to time, and by the device of creating the Archbishop of Canterbury '*legatus natus*' of the holy see (*d*). But England possesses in her provincial constitutions, collected by Lyndewode, a body of domestic ecclesiastical law, upon which, before the Reformation, a national independent character was in many respects impressed. The common law was always disposed to recognize these constitutions, while to the general canon law it always manifested considerable averseness.

"But it has always been the doctrine of the temporal and ecclesiastical courts since the Reformation that the constitutions contained in Lyndewode, and the general usages of the church, and certain portions of the canon law admitted by those usages, are still binding upon the church of this realm.

"I will give some instances :

Burder v.
Mavor.

"So late as the year 1848 (*e*) criminal articles were preferred against a clerk in holy orders for accepting a benefice with cure of souls whilst in possession of another benefice with a cure of souls without dispensation. The articles alleged that by the 29th canon of the 24th Council of Lateran, A.D. 1215, he was *ipso jure* deprived of the first living. Sir H. Jenner Fust observed (*f*), 'The first of the articles sets forth the law, namely, that by a decree of the Council of Lateran, when any person in possession of a benefice with cure of souls shall accept another like benefice, the former becomes void, that is, he loses that benefice, and that is the law of this country at this time. The Statute of Henry VIII. does not affect this law, except that it makes the other living voidable ; that is, by sentence, or void by presentation of the patron.'

"Under these circumstances, the facts being proved, the court is bound to sign a sentence, declaring the perpetual curacy of Forest Hill void by Mr. Mavor's acceptance of another benefice with cure of souls.'

Sanders v.
Head.

"In the case of *Sanders v. Head* (*g*), Sir Herbert Jenner Fust said, 'It has been made a subject of complaint, on behalf of Mr. Head, that the articles do not contain any specification of

(*d*) "Thus much is evident, as Gervasius, in the life of William, at this time (anno 1125) Archbishop of Canterbury, well observes, that the legatine power was looked upon as a breach of the law of England, and an invasion of the ancient liberties of the English Church and nation, as well as the rights of the

sees of Canterbury and York in particular, and that the minds of men were scandalized and offended at it." Inett, "*Origines Anglicanæ*," vol. II., p. 223.

(*e*) *Burder v. Mavor*, 1 Roberts. p. 614; 6 N. C. p. 1.

(*f*) *Ibid.* at p. 3.

(*g*) 3 Curt. p. 577.

the law relied on to establish them; that the first article is merely general, and that, under such general pleading, it is difficult for a defendant to know how to address himself to the question of law applicable to his case; that the canon law has been referred to generally without particular specification.' . . .

"Now the objection taken in this case is not taken for the first time, it has been frequently taken in this court, and, as often, overruled. The answer always given to the objection is, that where the general law ecclesiastical is relied on, it is not necessary to plead specifically; that where the offence is one generally cognizable in the ecclesiastical court it is not necessary to point out the particular canon or statute on which the proceedings are founded.'

"In the case of *Kemp v. Wickes* (h), Sir John Nicholl said, *Kemp v. Wickes.*
'The law of the Church of England and its history are to be deduced from the ancient general canon law, from the particular constitutions made in this country to regulate the English church, from our own canons, from the rubric, and from any acts of parliament that may have passed upon the subject; and the whole may be illustrated also by the writings of eminent persons.'

"In the year 1866 a royal licence was granted to Convocation to alter certain canons of 1603; the licence recited the 25th of Hen. VIII. c. 19, restraining the meeting of Convocation, and continued as follows:—

"And further, by the said act it is provided that no canons, constitutions, or ordinance should be made or put in execution within this realm, by authority of the convocation of the clergy, which shall be contrariant or repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm, anything in the said act to the contrary thereof notwithstanding; and lastly, it is also provided by the said act that such canons, constitutions, ordinances, and synodals provincial which then were already made, and which were not contrary or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal, should then still be used and executed as they were upon making of the said act, till such time as they should be viewed, searched, or otherwise ordered and determined by the persons mentioned in the said act, or the more part of them, according to the tenor or form and effect of the said act, as by the said act amongst divers other things more fully and at large it doth and may appear.'"

Chief Justice Hale says, "I conceive that, when christianity *Canon law.*
was first introduced into this land, it came not without some form of external ecclesiastical discipline or coercion, though at first it entered into the world without it, but that external discipline could not bind any man to submit to it, but either by force of the supreme civil power, where the governors received

it, or by the voluntary submission of the particular persons that did receive it; if the former, then it was the civil power of the kingdom which gave that form of ecclesiastical discipline its life: if the latter, it was but a voluntary pact or submission which could not give it power longer than the party submitting pleased, and then the king allowed, connived at, and not prohibited it; and this, by degrees, introduced a custom whereby it became equal to other customs or usages" (i).

Justice Whitlock, in *Ever v. Owen* (k), observes: "There is a common law ecclesiastical, as well as our common law, *jus commune ecclesiasticum*, as well as *jus commune laicum*."

Reg. v. Millis.

"I know of no authority," observes Hoffman (l), "in which the rule upon this subject is stated with more precision and accuracy than in the opinion of Chief Justice Tindal, in the *Queen v. Millis*" (m). "I proceed in the last place to endeavour to show that the law by which the spiritual courts of this kingdom have from the earliest time been governed and regulated, is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those courts *proprio vigore*, but instead thereof an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical constitutions of our archbishops and bishops, and by the legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law. . . . But that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England has been long settled and established law."

So Lord Abinger in the same case (n), "The learned judges have, I think, satisfactorily derived it" (i.e., the ecclesiastical law of England) "from the constitutions of the ecclesiastical synods and councils in England, before the authority of the pope was acknowledged in this country. I take that part only of the foreign law to be the ecclesiastical law of England, which has been adopted by parliament or the courts of this country" (o).

Sources of
the law.

The law of the Church of England is, then, derived from the leading general councils of the undivided church, from a practice and usage incorporating portions of the general canonical jurisprudence, from provincial constitutions, from canons passed by her clergy and confirmed by the crown in convocation, and from statutes enacted by parliament, that is, the crown, the spirituality and the temporality of the realm.

(i) MS. quoted by Lord Hardwicke in *Middleton v. Crofts*, 2 Atk. (3rd ed.) p. 668.

(k) Godb. p. 432.

(l) On the Law of the Protestant Episcopal Church in the United

States, p. 45. New York, 1850.

(m) 10 Cl. & Fin. p. 678.

(n) Ibid. p. 745.

(o) See Lord Cottenham to the same effect. Ibid. p. 876.

CHAPTER V.

CLERGY AND LAITY.

THE members of the church (*ecclesia*) may be not inconveniently considered under four categories. Members of the church.

1. That which includes those who have a peculiar and separated position in the church, to whom belongs the *status ecclesiasticus specialis*, bishops, priests or deacons, who belong to the *status clericalis* or the clergy, who are by their ordination distinguished from the laity (*a*).

2. That which includes those who discharge the duties of a clerical office, whether attached to a see or college, or cathedral, or hospital, or almshouse, or to a simple benefice with cure of souls, or to a curacy according to the custom of the English Church.

This is sometimes designated *status ecclesiasticus sensu stricto*.

3. That which includes those who, not being in holy orders, have, as laymen, an official or peculiar connection with the church: who discharge offices connected with the administration and discipline of the church: official principals of the courts of the province, chancellors of dioceses, vicars-general, commissaries, officials of archdeaconries, apparitors, churchwardens. To this category belong also clerks, lay readers, laymen authorized by the bishop to perform certain acts, members of religious fraternities, and sisterhoods belonging to the Church of England (*b*).

4. That which includes all the faithful (*fideles*) who, having been duly received into the church, are entitled to the benefit of her ministrations and sacraments until they have been excommunicated (*c*).

(*a*) Roman canonists add the category of those who have bound themselves by irrevocable vows and solemn obligations to what is technically called a religious life, who have, as our law books used to say, entered into religion. This class was again subdivided into regular (*regulares*) as opposed to secular (*seculares*), but it is a class no longer recognized by our law.

(*b*) Monks were rarely in holy orders before the tenth century.

(*c*) *Kemp v. Wickes*, 3 Phillim. p. 274; *Escott v. Mastin*, 2 Curt. p. 692; *Mastin v. Escott*, 4 Moo. P. C. C. p. 104; Charge of Bishop of Exeter, 1842; *Titchmarsh v. Chapman*, 3 Curt. p. 840; Art. 33, Can. 65, 85; 5 Eliz. c. 23; 53 Geo. 3, c. 127; English Prayer Book—the Order for the Burial of the Dead, first Rubric; the Order for the administration of the Lord's Supper, Rubrics prefixed to Communion Service and after Nicene Creed.

PART II.

ORDERS AND OFFICES OF THE CHURCH.

CHAPTER I.

BISHOPS.

- SECT. 1.—*Early History of Bishops and Archbishops.*
 2.—*Archbishops and Bishops in England, generally.*
 3.—*The Archbishops of England.*
 4.—*Form and Manner of making and consecrating Archbishops and Bishops.*
 5.—*Concerning Residence at their Cathedrals.*
 6.—*Concerning their Attendance in Parliament.*
 7.—*Spiritualities of Bishoprics in the Time of Vacation.*
 8.—*Temporalities of Bishoprics in the Time of Vacation.*
 9.—*Archbishops' Jurisdiction over their Provincial Bishops.*

SECT. 1.—*Early History of Bishops and Archbishops.*

Theories as
to bishops.

THE Ultramontanists (*a*) maintain that the bishops do not obtain their authority immediately from God, as the true successors of the apostles, but mediately through the power of the pope—inasmuch as the pope is not only the patriarch of the Western Church, but the head of the whole visible church, as the successor of St. Peter.

The Greek Church, as well as the Anglican, American, Scotch, Irish and Colonial Episcopal Churches, maintain that, as the successor of St. Peter, the pope has no such status, but that our Lord gave to St. Peter, to whose bishopric the pope succeeded, the same authority as that which he gave to the other apostles (*b*);

(*a*) Walter, Lehrbuch, §§ 145, 223, 228.

(*b*) "Oh Almighty God, who hast built thy church upon the apostles and prophets, Jesus Christ himself being the chief corner stone," &c. (English Prayer Book, Collect for St. Simon and St. Jude, apostles).

that they all, after his death, equally exercised this authority—that they constituted bishops as their legitimate successors and as the spiritual rulers of the church. To these was committed the *potestas ordinis*, which relates to the administration of the sacraments and the performance of public worship,—deriving its name from the fact that these functions are discharged by those in holy orders, which the bishop confers: and the *potestas jurisdictionis*, if the word *jurisdictio* can be properly applied to express an authority which *per se*, and apart from the assistance of the state, can exercise no physical or external coercion on those who are not the subjects of it.

The great authorities referred to in the note (c) should be consulted by those who wish to be thoroughly conversant with a detailed history of the origin and continuance of the order of bishops in the christian church throughout every country where that church has been permitted to flourish, as well as in our own islands. The history of episcopacy in the latter is sketched with much spirit and fidelity by Palmer in his *Antiquities of the English Ritual* (d). “The church (says Giannone), even during the three first centuries, knew no other hierarchy, no other orders than those of bishops, priests and deacons” (e). But this assertion, though generally true, requires some qualification; for the language of the Council of Nice (A.D. 325), renders it quite clear that certain bishops had a pre-eminence and dignity above the rest. “Let those customs (said this council) remain in force which have been of old the customs (*ἀρχαῖα ἔθνη*) of Egypt, and Lybia and Pentapolis; by which customs the Bishop of Alexandria hath authority over all these, and the rather, that this hath also been the use of the bishops of Rome, and the same hath been observed in Antioch and in other provinces.” The first Council of Constantinople, held eighty years after the Nicene Synod, added the Bishop of Constantinople to the number of these primates or metropolitans of Alexandria, Antioch and Rome, assigning him a place second in dignity to the latter (f). In the first times of the church (the very learned Professor Walter observes) (g) the nomination of bishops was conducted in strict accordance with the precedent set by the apostles. The neighbouring bishops invoking the *clerus* and the congregations of the widowed see, chose the new bishop, examined him, and

Early history
of bishops.

(c) Van Espen, *Jus Ecclesiasticum Universum*, pars 1, tit. 13, de Elect. et Nomin. Episcoporum; Thomassini *Vetus et Nova Ecclesiæ Disciplina*, vol. ii., pt. ii., p. 313, de Episcop. Elect. et Confirmatione; Giannone, *Istoria Civile dei regni di Napol.* lib. 1, ed. 2; Bingham, *Orig. Eccl.*; Stillingfleet's *Orig. Brit.*; Hooker, *Eccles. Pol.*, 6th, 7th and 8th books. Christenthum und Kirche, von J. Von Döllinger,

Regensburg, Buch, iii. §§ 12—22; Walter, *Lehrbuch*, §§ 143, 228.

(d) *Origines Liturgiæ*, vol. ii. p. 246.

(e) L. 1, c. xi. § 4.

(f) So Cyprian (A. D. 280) was Metropolitan of Carthage; and Archbishop Usher and others conceive that the bishops of the seven churches in Asia were metropolitans.

(g) Walter, *Lehrbuch*, § 226.

forthwith consecrated him to his office. By degrees these three actions became more and more severed and underwent certain changes. The choice was made by the clergy, the municipality (*ordo*), the higher officers (*honorati*), and the citizens. The metropolitan, assisted by the bishops of his province, examined the candidate. The ordination or consecration was performed within the space of three months by the metropolitan and his comprovincial bishops—by three bishops at the least. But it was not till after Constantine had publicly embraced christianity that the dignities of metropolitans, archbishops, primates, exarchs or patriarchs, were so established in the church as to correspond with the secular magistracies of the state; and from this period these titles seem to have been bestowed (*i*) with reference to the greater or less extent of the provinces over which they held spiritual sway. The metropolitans were so called because they presided over the churches of the principal cities of the province. It was their duty not only to ordain, as has been said, the bishops of their province, but also to convoke provincial councils, and to exercise a general superintendence over the doctrine and discipline of the bishops and clergy within the provinces. These are the functions ascribed to them by the Council of Nice (A.D. 325), by the councils which followed soon afterwards, by the ecclesiastical writers of the fourth and fifth centuries, and by the edicts of Justinian (*k*). The title of archbishop was one of honour, but brought with it no authority, and was at first very rarely bestowed, and only on the most distinguished bishops. The name is not to be met with during the three first centuries. It occurs for the first time in the fourth century, and St. Athanasius appears to have been among the earliest who were distinguished by this title (*l*). In the fifth century it was conferred on the bishops of Rome, Antioch, Alexandria, Constantinople, Jerusalem, Ephesus, and Thessalonica. Gregory the Great extended it much farther. In the eighth century it became still more common, and in later times was bestowed upon all metropolitans (*m*), and occasionally, as in the Neapolitan dominions, upon simple bishops. The exarch or patriarch presided over the whole civil diocese, and therefore over all the metropolitans of the different provinces which composed it.

Election of
bishops.

Thomassin establishes three propositions with respect to the election of the bishops during the first centuries. These propositions, the fruit of a very long and learned inquiry, are, 1, that the

(*i*) The word diocese was borrowed from the Roman government, who had adopted it from the Greeks. "Si quid habebis cum aliquo Hellespontio controversiæ ut in illam διοίκησιν rejicias." Cic. fam. lib. 13, ep. 53. For a province was parcelled out into dioceses; and Cicero here requests the Proprætor that his friend's cause may be heard in the court of the diocese at the

Hellespont, and not in the chief or metropolitan court of the province, i. e. Ephesus.

(*k*) Novel. cxxiii.

(*l*) He was elevated from the humble rank of deacon to the archiepiscopal throne of Egypt, and filled that eminent station above forty-six years, A. D. 326—373.

(*m*) Like the title Primus in the Scotch Church.

bishops exercised the chief influence in the election of another bishop (*electores primarios fuisse episcopos*); 2, that though the people were always among the electors, their voice carried with it less weight than that of the clergy (*clero plus tributum quam populo*); 3, that the consent of the prince was an indispensable preliminary to the consecration of the bishop by the metropolitan (*consensum regis necessarium*). The part which the people took in the election of the early bishops rests on indubitable proofs. Theodoretus' complaint against Lucius the Arian is, that he was chosen "*non episcoporum orthodoxorum synodo, non clericorum virorum suffragio, non petitione populorum, ut ecclesie leges præcipiunt.*" And on the other hand, St. Athanasius, desiring to justify himself from the aspersions of his calumniators, asserts, "*omnia canonicè inquiri et peragi decebat, præsentibus populis et clericis.*" There is also a very remarkable letter of Gregory VII., cited by Van Espen, in which that pontiff charges the "*episcopum Aurelianensem,*" amongst other offences, "*sine idoneâ cleri et populi electione ecclesiam invasisse.*" Van Espen seems to estimate the influence of the people in these elections more highly than Thomassin, especially in the Latin Church. Certain it is, however, that as the numbers of the clergy increased, they gradually excluded the people altogether.

But before the thirteenth century, their own influence was transferred to the cathedral chapters, "*quasi clerum repræsentantia,*" who became and are in England nominally to this day the sole electors of the bishop (*n*). The origin of this now universal practice is traced by Van Espen (citing Onuphrius) to the long schism which occurred about the election of Alexander III. to the papacy, which led to the transference of this right to the college of cardinals, as the representatives of the Roman clergy. It is remarkable that no mention of this privilege of cardinals and chapters is to be found in the older canons, or the "*Decretum*" of Gratian. In these the right of election is simply alleged as belonging to the clergy; with whom the bishop is desired to transact "*majora ecclesie negotia.*" It would seem that towards the beginning of the thirteenth century this right of the chapters to elect bishops was established, which Van Espen condemns as a manifest departure from the spirit of the ancient canons (*o*).

Origin of cathedral chapters and of the college of cardinals.

The consent of the prince seems to have been invariably considered as necessary for the due election of the bishop since the time of Constantine. There are many imperial constitutions upon this subject, as well as upon points of general canonical discipline. That of Justinian "*de examinatione et confirmatione Episcoporum,*" is alone sufficient evidence of the practice of the

Consent of the prince.

(*n*) About the time of Innocent III.

(*o*) "*Quid enim propriè est Synodus Diœcesana, nisi conventus constans ex Episcopo et clero suæ*

Diœcesis, præsertim eorum de clero qui una cum ipso curam animarum sustinent." Van Espen, *Jus Ecclesiasticum Universum*, pars. 1, tit. 13, c. 2.

Eastern Church in submitting their episcopal choice to the approbation or refusal of their temporal sovereign. The same custom prevailed universally in the Western Church. The Council of Toledo (A.D. 681) even went so far as to declare that Spanish sovereigns nominated bishops "*suo nutu*;" and the great Spanish canonist, Covarruvias (*p*), pronounces such nomination to be a monarchical privilege, "*vi juris patronatus*." Various "concordats" establish this to have been the custom of the Gallican Church, as well as the independence of that church on the Roman See. The same power has been immemorially exercised by the kings of England (*q*). It has been established by abundant proof that the Pope's attempt to resist this privilege was never successful in this country. Speaking of the creation of bishops after A.D. 1000, Thomassin says, "*trajicientibus nobis ex Galliâ in Angliam eadem leges, eadem canonicæ doctrinæ occurrent documenta, non eadem religio aut observantia in sedem apostolicam*" (i.e. Rome). It is in fine the general opinion of all canonists that catholic princes, in countries where church and state are united, have a right to nominate the bishop, as a private patron has the right to present his clerk, under the same condition, that the presentee be "*idoneus*."

English
bishops.

The earliest account of English bishops is the record of their appearance at the councils of Arles, Nice, Sardica, and Ariminum, in the fourth century. The episcopacy of this country may be traced in an unbroken chain from this very early period to the present day. It would seem that in the ninth century Irish prelates converted a great part of the pagan invaders in the north of England, contemporaneously with the conversion of the Anglo-Saxons by St. Augustine (*r*). Bede (*s*) gives an account of the conference of seven British bishops with St. Augustine. The learned Hooker's description of episcopal powers and functions is as follows:—"A bishop is a minister of God, unto whom, with permanent continuance, there is given, not only power of administering the word and sacraments, which power other presbyters have, but also a further power to ordain ecclesiastical persons, and a power of chieftly in government over presbyters as well as laymen, a power to be by way of jurisdiction, a pastor even to pastors themselves. So that this office, as he is a presbyter or pastor, consisteth in those things which are common unto him with other pastors, as in ministering the word and sacraments: but those things incident unto his office, which do properly make him a bishop, cannot be common unto him with other pastors. Now even as pastors, so likewise bishops, being

Hooker's
description
of episcopal
powers.

(*p*) Covarruvias ad cap. Possessor malæ fidei, pt. 2, § 10, 5, par. 433. At one time the chapters had the right of electing, and then they sought a license from the king as a preliminary, and his confirmation of their choice. Ibid.

(*q*) See Bede's account of Alfred's nomination of Wilfred, Hist. lib. v. c. 19.

(*r*) Stillingfleet, Orig. Brit. ch. 2, 3, 4.

(*s*) Bede, Hist. lib. v. c. 2, § 92.

principal pastors, are either at large or else with restraint: at large, when the subject of their regiment is indefinite, and not tied to any certain place; bishops with restraint are they whose regiment over the church is contained with some definite, local compass, beyond which compass their jurisdiction reacheth not. Such therefore we alway mean, when we speak of that regiment by bishops, which we hold a thing most lawful, divine and holy, in the Church of Christ" (*t*).



SECT. 2.—*Archbishops and Bishops in England, generally.*

The temporalities of archbishops and bishops are dealt with later in the same Part that treats of the temporalities of all the beneficed clergy (*u*). By 23 & 24 Vict. c. 124, and 29 & 30 Vict. c. 111, provision is made for transferring these temporalities in some cases to the care of the ecclesiastical commissioners and for the allowances to be made to archbishops and bishops.

Temporalities.

By the preface to the form and manner of making, ordaining, and consecrating of bishops, priests and deacons, every man which is to be ordained or consecrated bishop shall be full thirty years of age.

Age of persons to be made bishops.

The reason given by the canon law is, that our Saviour was baptised and began to preach at this age (*x*).

The ancient Britons are believed to have had at least one archiepiscopal see before the times of St. Augustine, viz., at Caerleon, or (as some would have it) at Llandaff (*y*).

Constitution of the state ecclesiastical in England.

The ecclesiastical state of England and Wales is now divided only into two provinces or archbishoprics—Canterbury and York. Each archbishop has within his province bishops of several dioceses. The Archbishop of Canterbury has under him within his province, of ancient foundations, Rochester, London, Winchester, Norwich, Lincoln, Ely, Chichester, Salisbury, Exeter, Bath and Wells, Worcester, Lichfield, Hereford, Llandaff, St. David's, Bangor, and St. Asaph; four founded by King Henry VIII., erected out of the ruins of dissolved monasteries, viz., Gloucester and Bristol (now united), Peterborough and Oxford, and of recent creation St. Albans, Truro, and Southwell. The Archbishop of York has under him, Chester, newly erected by King Henry VIII., and annexed by him to the archbishopric of York; Durham, Carlisle and Sodor and Man, annexed to the province of York by King Henry VIII.; the two new sees of Ripon and Manchester, and the still later ones of Liverpool, Newcastle-on-Tyne, and Wakefield. "But a greater number this archbishop anciently had, which time hath taken from him" (*z*).

Bishoprics founded by Hen. 8.

(*t*) Hooker, Eccles. Pol. bk. vii.

(*x*) Dist. 78, c. 3.

(*u*) See infra, Part V., Chap. II., sect. 2; Ibid. Chaps. V., VI., and Part IX., Chap. III.

(*y*) Johns. p. 35; God. p. 17.

(*z*) 1 Inst. p. 94. See infra, p. 32.

Act of 6 & 7
Will. 4, c. 77.

The statute 6 & 7 Will. 4, c. 77, which created the two bishoprics of Ripon and Manchester, provided also for remodelling the state of the old dioceses by an entirely new adjustment of the revenues and patronage of each see, and by extending or curtailing the parishes and counties hitherto subject to their spiritual jurisdiction. This Act is entitled "An Act for carrying into effect the reports of the commissioners appointed to consider the state of the established church in England and Wales, with reference to ecclesiastical duties and revenues, so far as they relate to episcopal dioceses, revenues and patronage." It recites the appointment and reports of two previous commissions; it recommends the appointment of fresh commissioners (the Archbishops of Canterbury and York, the Bishop of London for the time being, and certain great officers of state), to carry into effect the recommendations contained in four reports of previous commissioners; empowers the new commission to lay these schemes before the king in council, and enacts that such schemes shall become law when gazetted in the London Gazette. All the alterations proposed are to take effect with the consent of the bishop after the 4th day of March, 1836, or, in the event of such consent being withheld, on the avoidance of each see after such date.

Recommendations of the ecclesiastical commissioners.

The diocese of Canterbury.

London.

The recommendations which are to be so carried out are recited in the preamble as follows: "That the diocese of Canterbury consist of the county of Kent (except the city and deanery of Rochester, and those parishes which it is proposed to include in the diocese of London), and of the parishes of Croydon and Addington, and the district of Lambeth Palace, in the county of Surrey; and that the diocese of London consist of the city of London and the county of Middlesex [of the parishes of Barking, East Ham, West Ham, Little Ilford, Low Layton, Walthamstow, Wanstead, Saint Mary Woodford, and Chingford, in the county of Essex (*a*)], all in the present diocese of London; [of the parishes of Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, and Saint Nicholas Deptford, in the county of Kent, and Saint Paul Deptford, in the counties of Kent and Surrey, all now in the diocese of Rochester (*b*);] [of the borough of Southwark, and the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, Rotherhithe, Streatham, Tooting Graveney, Wandsworth, Merton, Kew, and Richmond, in the county of Surrey and present diocese of Winchester (*c*)]; and of the parishes of Saint Mary Newington, Barnes, Putney, Mortlake, and Wimbledon, in the county of Surrey and in the peculiar jurisdiction of the Archbishop of Canterbury, together with all extra-parochial places locally

(*a*) The parishes last mentioned, placed in the text within brackets, were transferred to the diocese of Rochester by 26 & 27 Vict. c. 36, s. 2.

(*b*) The parishes last mentioned, placed in the text within brackets,

were to remain in Rochester by the act last quoted.

(*c*) The parishes last mentioned, placed in the text within brackets, were to remain in Winchester by 26 & 27 Vict. c. 36, s. 2.

situate within the limits of the parishes above enumerated,
 except the district of Lambeth Palace; and that the diocese of
 Winchester be diminished by the transfer of the parish of Winchester.
 Addington to the diocese of Canterbury, and of the before-
 mentioned parishes to the diocese of London; and that the Gloucester
 whole of the parish of Bedminster be transferred from the and Bristol.
 diocese of Bath and Wells to the diocese of Gloucester and
 Bristol; and that the city and deanery of Bristol be united to
 the diocese of Gloucester; and that the southern part of the Salisbury.
 diocese of Bristol, consisting of the county of Dorset, be trans-
 ferred to the diocese of Salisbury; and that the diocese of Ely Ely.
 be increased by the counties of Huntingdon and Bedford, now
 in the diocese of Lincoln, by the deaneries of Lynn and Fincham
 in the county of Norfolk and diocese of Norwich, and by the
 archdeaconry of Sudbury in the county of Suffolk and diocese
 of Norwich, with the exception of the deaneries of Sudbury,
 Stow, and Hartismere, and by that part of the county of Cam-
 bridge which is now in the diocese of Norwich; and that it be Exeter.
 declared that the Scilly Islands are within the jurisdiction of
 the bishop of Exeter and of the archdeacon of Cornwall; and
 that the sees of Gloucester and Bristol be united (*d*), and that Gloucester
 the diocese consist of the present diocese of Gloucester, of the and Bristol
 city and deanery of Bristol, of the deaneries of Cricklade and to be united.
 Malmesbury in the county of Wilts and now in the diocese of
 Salisbury, and of the whole of the parish of Bedminster, now in Hereford.
 the diocese of Bath and Wells; and that to the diocese of
 Hereford be added the deanery of Bridgnorth, now locally
 situated between the dioceses of Hereford and Lichfield; and
 that those parts of the counties of Worcester and Montgomery
 which are now in the diocese of Hereford be transferred to the
 dioceses of Worcester and St. Asaph and Bangor respectively; Lichfield.
 and that the diocese of Lichfield consist of the counties of Lincoln.
 Stafford and Derby; and that the diocese of Lincoln consist of
 the counties of Lincoln and Nottingham; and that the latter
 county, now in the diocese and province of York, be included
 in the province of Canterbury; and that the diocese of Norwich Norwich.
 consist of the counties of Norfolk and Suffolk, except those
 parts which it is proposed to transfer to the diocese of Ely;
 and that the diocese of Oxford be increased by the county of Oxford.
 Buckingham, now in the diocese of Lincoln, and by the county
 of Berks, now in the diocese of Salisbury; and that the diocese Peterborough.
 of Peterborough be increased by the county of Leicester, now
 in the diocese of Lincoln; and that the diocese of Rochester Rochester.
 consist of the city and deanery of Rochester, of the county of
 Essex (excepting the parishes which it is proposed to leave in
 the diocese of London), and of the whole county of Hertford;
 and that to the diocese of Salisbury, reduced according to the Salisbury.
 foregoing propositions, be added the county of Dorset, now

(*d*) See now 47 & 48 Vict. c. 66.

Worcester.	in the diocese of Bristol; and that the diocese of Worcester consist of the whole counties of Worcester and Warwick; and that the sees of Saint Asaph and Bangor be united, and that the diocese consist of the whole of the two existing dioceses (except that part of the diocese of Saint Asaph which is in the county of Salop), and of those parts of the county of Montgomery which are now in the dioceses of Saint David's and Hereford (<i>e</i>); and that the diocese of Llandaff consist of the whole counties of Glamorgan and Monmouth; and that the diocese of Saint David's be altered by the transfer of those parts of the counties of Montgomery, Glamorgan and Monmouth which it is proposed to include in the respective dioceses of Saint Asaph and Bangor and Llandaff; and that the diocese of York consist of the county of York, except such parts thereof as it is proposed to include in the new diocese of Ripon; and that the diocese of Durham be increased by that part of the county of Northumberland called Hexhamshire which is now in the diocese of York; and that the sees of Carlisle and Sodor and Man be united (<i>f</i>), and that the diocese consist of the present diocese of Carlisle, of those parts of Cumberland and Westmorland which are now in the diocese of Chester, of the deanery of Furnes and Cartmel in the county of Lancaster, of the parish of Aldeston, now in the diocese of Durham, and of the Isle of Man; and that the diocese of Chester consist of the county of Chester, of so much of the county of Flint as is now in that diocese, and of so much of the county of Salop as is not in the diocese of Hereford, and that the whole diocese be included in the province of York; and that two new sees be erected in the province of York, one at Manchester and the other at Ripon; and that the diocese of Manchester consist of the whole county of Lancaster except the deanery of Furnes and Cartmel; and that the diocese of Ripon consist of that part of the county of York which is now in the diocese of Chester, of the deanery of Craven, and of such parts of the deaneries of the Ainsty and Pontefract in the county and diocese of York as lie to the westward of the following districts; videlicet, the liberty of the Ainsty and the wapentakes of Barkston Ash, Osgoldcross, and Staincross; and that all parishes which are locally situate in one diocese, but under the jurisdiction of the bishop of another diocese, be made subject to the jurisdiction of the bishop of the diocese within which they are locally situate; and that such variations be made in the proposed boundaries of the different dioceses as may appear advisable, after more precise information respecting the circumstances of particular parishes or districts; and that the bishops of the two newly erected sees be made bodies corporate, and be invested with all the same rights and privileges as are now
St. Asaph and Bangor.	
Llandaff.	
St. David's.	
York.	
Durham.	
Sodor and Man.	
Carlisle.	
Chester.	
Two new sees of Manchester and Ripon.	
Peculiars.	
Rights of new bishops.	

(*e*) The mischief of this union was happily prevented by a later statute.

(*f*) This mischief was also prevented by a later statute.

possessed by the other bishops of England and Wales, and that they be made subject to the metropolitan jurisdiction of the Archbishop of York, and that the collegiate churches of Manchester and Ripon be made the cathedrals, and that the chapters thereof be the chapters of the respective sees of Manchester and Ripon, and be invested with all the rights and powers of other cathedral chapters; and that the members of these and of all other cathedral churches in England be styled dean and canons that the bishops of the see of Bristol and Gloucester be elected alternately by the dean and chapter of Bristol and by the dean and chapter of Gloucester; that power be given to determine the future mode of confirming such acts of the bishop of either of the united sees as may require confirmation by a dean and chapter; and that upon the first avoidance of either of the sees of Saint Asaph or Bangor and of Gloucester or Bristol the bishop of the other of the sees proposed to be united become *ipso facto* bishop of the two sees, and thereupon become seised and possessed of all the property, advowsons, and patronage belonging to the see so avoided; and that the jurisdiction of the bishop's court in each diocese be co-extensive with the limits of the diocese as newly arranged; and that such arrangements be made with regard to the apportionment of fees payable to the officers of the several diocesan courts as may be deemed just and equitable, for the purpose of making compensation to those officers who may be prejudiced by the proposed alterations; and that such alterations be made in the apportionment or exchange of ecclesiastical patronage among the several bishops as shall be consistent with the relative magnitude and importance of their dioceses when newly arranged, and as shall afford an adequate quantity of patronage to the bishops of the new sees."

Collegiate churches of Manchester and Ripon to be cathedrals of these two new sees.

How the bishops of Gloucester and Bristol are to be elected.

Courts and fees.

Patronage.

Other recommendations.

Orders in Council.

Sodor and Man and St. Asaph preserved.

The other recommendations in the preamble related to the future income of archbishops and bishops; provision to be made from the see of Durham for the University of Durham; residences to be provided for Lincoln, Llandaff, Rochester, Manchester and Ripon, and the creation of new archdeaconries (g).

The territorial alterations thus recited were (except so far as they were modified by the later statutes) all substantially carried out by schemes confirmed by Orders in Council. These orders are many in number—the earliest bearing date October 5th, 1836, and the latest, apparently, May 15th, 1852 (h).

The bishopric of Sodor and Man has since been rescued and confirmed in its existence as an independent bishopric by 1 Vict.

(g) See now 26 & 27 Vict. c. 36, s. 3.

(h) See Orders in Council, ratifying schemes of the Eccles. Commrs. for England (printed by Queen's printers), 9 vols. with index vol. to 1854, 6 further vols. to 1862.

The later Orders in Council ratifying schemes of the Eccles. Commrs. for England, will for the most part be found printed in the annual reports of such commissioners to parliament.

c. 30 (i). The bishoprics of St. Asaph and Bangor were preserved by 10 & 11 Vict. c. 108.

Consequential
arrange-
ments.

By 10 & 11 Vict. c. 98, jurisdiction over the transferred portions of a diocese was given to the bishop and ecclesiastical courts of the diocese to which they were transferred. This act was temporary only, but has been annually continued.

By 13 & 14 Vict. c. 94, s. 2, certain benefices annexed to the sees of Gloucester and Bristol, Oxford and Peterborough are taken away, and provision is ordered to be made for increasing the income of these sees out of the general funds of the ecclesiastical commissioners.

By 21 & 22 Vict. c. 71, provision is made for making the bishop within whose diocese any place is brought by reason of any re-arrangement of dioceses trustee of any local trusts in lieu of the former bishop.

By 26 & 27 Vict. c. 36, s. 2, the dioceses of London, Winchester, and Rochester were for the time re-arranged as stated in the notes to p. 24.

St. Albans.

By "The Bishopric of St. Albans Act, 1875" (38 & 39 Vict. c. 34), provision was made for the creation of a new bishopric of St. Albans, "with a diocese consisting of the counties of Hertford and Essex, and of that part of the county of Kent which lies north of the River Thames, or of such parts thereof as to her Majesty may seem meet." (Sect. 4.)

The abbey church of St. Albans, subject to the rights of the incumbent, was to be the cathedral church. (Ibid.)

The crown was also empowered to transfer to the residue of the diocese of Rochester "all such parishes situate wholly or partly in the parliamentary divisions of East Surrey and Mid Surrey as now form part of the diocese of Winchester, also all such parishes situate in the county of Surrey as now form part of the diocese of London." (Sect. 5.)

Truro.

By "The Bishopric of Truro Act," 1876 (39 & 40 Vict. c. 54), provision was made for the founding of a new bishopric of Truro, "with a diocese consisting of the archdeaconry of Cornwall, or of such part thereof as to her Majesty may seem meet." (Sect. 4.)

The parish church of St. Mary, Truro, subject to the rights of the patron and incumbent, was to be the cathedral church (k). (Ibid.)

By "The Bishopric Act, 1878" (41 & 42 Vict. c. 68), provision was made for the founding of four new bishoprics as funds were forthcoming, their names, territorial areas, and cathedrals to be as follows:

Liverpool.

"I. *Bishopric of Liverpool.*

"1. The bishop to be Bishop of Liverpool.

(i) But no ecclesiastical benefice can now be holden *in commendam* with this see.

(k) See 41 & 42 Vict. c. 44; 50 & 51 Vict. c. 12; *infra*, Part II., Chap. IV., sect. 3.

"2. The diocese to consist of the West Derby hundred of the county of Lancaster, with the exception of so much of the said hundred as is now in the diocese of Manchester, and to include the whole of the ancient parish of Wigan.

"3. Such church at Liverpool as may be determined by the Order of Her Majesty in Council, subject to the rights of the patron and incumbent of such church, to be the cathedral church" (l).

"II. *Bishopric of Newcastle.*

Newcastle.

"1. The bishop to be Bishop of Newcastle.

"2. The diocese to consist of the county of Northumberland, and the counties of the towns of Newcastle-upon-Tyne and Berwick-upon-Tweed, and to include such detached parts of any other county as are under any Act of Parliament deemed to form part of the county of Northumberland, or have been or can be transferred to the county of Northumberland by the justices in general or quarter sessions assembled, and to include also the ancient common law parish of Alston with its chapelries in the county of Cumberland.

"3. The parish church of Saint Nicholas at Newcastle-upon-Tyne, subject to the rights of the patron and incumbent of such church, to be the cathedral church" (m).

"III. *Bishopric of Southwell.*

Southwell.

"1. The bishop to be Bishop of Southwell.

"2. The diocese to consist of the counties of Derby and Nottingham.

"3. The parish and collegiate church of Southwell, subject to the rights of the patron and incumbent of such church, to be the cathedral church."

"IV. *Bishopric of Wakefield.*

Wakefield.

"1. The bishop to be Bishop of Wakefield.

"2. The diocese to consist of that part of the diocese of the bishopric of Ripon which lies southward of the northern boundaries of the ancient common law parishes of Halifax, Birstal, Batley, West Ardsley, East Ardsley, and Wakefield, or of so much of that part as may be determined by the Order of Her Majesty in Council, and for the purpose of re-arranging the boundary between such diocese and the diocese of the archbishopric of York, the Order of Her Majesty in Council (on the recommendation of the ecclesiastical commissioners, made, unless the see happens to be vacant, with the assent of the archbishop) may include in the diocese of the new bishopric

(l) See Order in Council of March 24, 1880, and 48 & 49 Vict. c. li.; infra, Part II., Chap. IV., sect. 4.
(m) See 47 & 48 Vict. c. 33; infra, Part II., Chap. IV., sect. 4.

any ecclesiastical parish or parishes situate in the diocese of York, and may transfer to the diocese of York any ecclesiastical parish or parishes situate in the above-mentioned part of the diocese of the bishopric of Ripon.

"3. Such church at Wakefield as may be determined by the Order of Her Majesty in Council, subject to the rights of the patron and incumbent of such church, to be the cathedral church."

All these bishoprics have been already founded:—St. Albans and Truro in 1877, Liverpool in 1880, Newcastle in 1882, Southwell in 1884, and Wakefield in 1888.

Bristol.

By "The Bishopric of Bristol Act, 1884" (47 & 48 Vict. c. 66), provision is made for the severance of the sees of Gloucester and Bristol, if funds should be forthcoming; the diocese of Bristol to be treated as a new bishopric, and to have its name, territorial area, and cathedral as follows:—

"1. The bishop to be Bishop of Bristol.

"2. The diocese to consist of (a) the deanery of Bristol (city division and rural division), and (b) the following three deaneries of North Wilts, that is to say, Malmesbury North and Malmesbury South and Cricklade, and (c) the following parishes in the county of Somerset, heretofore in the diocese of Bath and Wells; that is to say, Easton-in-Gordano, with Pill and Portbury and Portishead.

"3. The cathedral church of Bristol to be the cathedral church."

The diocese of Bristol has not yet been founded.

Divisions of dioceses.

Every diocese is divided into archdeaconries, whereof there used to be sixty; and every archdeaconry is parted into deaneries; and deaneries again into parishes, towns and hamlets (*n*).

But this division into parishes seems not to have been made all at once, but by degrees, as churches from time to time were built and endowed by lords of manors and others, for the use of their tenants or other inhabitants within such a district; and this seems to be the reason why there are some places at this day which are not in any parish, but are extra-parochial.

Revenues.

Every bishop at first was universal incumbent of his diocese, received all the profits, which were but offerings of devotion, out of which he paid the salaries of such as officiated under him, as deacons and curates in places appointed (*o*).

Afterwards, when churches became founded and endowed, he sent out his clergy to reside and to officiate in those churches; reserving nevertheless to himself a certain number in his cathedral to counsel and assist him, which are now called deans and prebendaries or canons.

(*n*) 1 Inst. p. 94.

(*o*) God. p. 23.



SECT. 3.—*The Archbishops of England.*

Canterbury was once the royal city of the kings of Kent; and was given by King Ethelbert, on his conversion to Christianity, to St. Augustine, the first archbishop thereof, about the year of our Lord 598 (*p*). Archbishop of
Canterbury.

If we consider Canterbury as the seat of the metropolitan, it has under it twenty-four bishops (as has been said); but if we consider it as the seat of a diocesan, so it comprehends only some part of Kent (the residue being in the diocese of Rochester), with three parishes or districts in Surrey. There was an ancient privilege of this see, that the places where the archbishop has any manors or advowsons are thereby exempted from the ordinary, and are become peculiars of the diocese of Canterbury, properly belonging to the jurisdiction of the Archbishop of Canterbury (*q*); but by recent legislation this privilege and exemption have been taken away.

The Archbishop of Canterbury is styled Primate and Metropolitan of all England, albeit there is another archiepiscopal province within the realm; partly, because when the popes had taken into their own hands, in a great measure, the archiepiscopal authority, they invested the Archbishops of Canterbury with a legatine authority throughout both the provinces; and partly, because the Archbishop of Canterbury has still the power, which the popes in time passed usurped, and which by act of parliament was again taken from the popes, of granting faculties and dispensations in both the provinces alike.

The Archbishop of Canterbury anciently had primacy, not only over all England, but over Ireland also, and from him the Irish bishops received their consecration; for Ireland had no other Archbishop till the year 1152. For which reason it was declared in the time of the two first Norman kings, that Canterbury was the metropolitan church of England, Scotland and Ireland, and of the isles adjacent; the Archbishop of Canterbury was therefore sometimes styled a patriarch, and *orbis Britannici pontifex*; insomuch that matters recorded in ecclesiastical affairs did run thus, viz., *anno pontificatus nostri primo, secundo, &c.* (*r*).

At general councils abroad, the Archbishop of Canterbury had the precedency of all other archbishops (*s*).

At home he has the privilege to crown the kings of England (*t*).

He is said to be enthroned, when he is vested in the archbishopric; whereas bishops are said to be installed (*u*).

He has prelates to be his officers: thus, the Bishop of London is his provincial dean; the Bishop of Winchester his chancellor; the Bishop of Lincoln anciently was his vice-chancellor; the

(*p*) God. pp. 13, 17.

(*q*) God. p. 14.

(*r*) God. p. 20.

(*s*) God. p. 21.

(*t*) God. p. 13.

(*u*) God. p. 21.

Bishop of Salisbury his precentor; the Bishop of Worcester his chaplain; and the Bishop of Rochester carried the cross before him (*x*).

He might retain and qualify eight chaplains; which is more by two than any duke was allowed to do by statute (*y*).

In speaking and writing to him is given the title of Grace, and Most Reverend Father in God.

He writes himself by divine providence; whereas bishops (other than the Bishop of Durham) only use by divine permission (*z*).

Archbishop of
York.

The first Archbishop of York that we read of was Paulinus, who by Pope Gregory's appointment was made archbishop there, about the year of our Lord 622 (*a*).

The province of York anciently claimed and had a metropolitan jurisdiction over all the bishops of Scotland, whence they had their consecration, and to which they swore canonical obedience, until about the year 1466, when George Nevil being at that time Archbishop of York, the bishops of Scotland withdrew themselves from their obedience to him; and in the year 1470, Pope Sixtus the Fourth created the Bishop of St. Andrews archbishop and metropolitan of all Scotland (*b*).

The Archbishop of York has the privilege to crown the queen consort, and to be her perpetual chaplain (*c*).

He also, in like manner as the Archbishop of Canterbury, is said to be introned when he is vested in the archbishopric.

And he may retain and qualify eight chaplains; whereas a bishop can only qualify six.

He also has the title of Grace, and Most Reverend Father in God; whereas bishops have the title of Lord, and Right Reverend Father in God.

And he writes himself by divine providence.

Their
precedence
in the state.

The Archbishop of Canterbury is the first peer of the realm, and has precedence, not only before all the other clergy, but also (next and immediately after the blood royal) before all the nobility of the realm; and as he has the precedence of all the nobility, so also of all the great officers of state (*d*).

The Archbishop of York has the precedence over all dukes, not being of the blood royal; as also before all the great officers of state, except the Lord Chancellor (*e*).

And every other bishop, in respect of his barony, has place of all the barons of the realm, under the degree of viscounts (*f*).

Their
precedence
one amongst
another.

The Archbishop of Canterbury has the precedence of all the other clergy; next to him the Archbishop of York; next to him the Bishop of London; next to him the Bishop of Durham;

(*x*) God. p. 14; Lind. pp. 104, 317; Wake, State of the Church, p. 13, makes Bp. of Winchester sub-dean, and Bp. of Lincoln chancellor.

(*y*) God. p. 21.

(*z*) God. p. 13.

(*a*) God. p. 12.

(*b*) God. pp. 14, 18.

(*c*) God. p. 19.

(*d*) God. p. 13.

(*e*) God. p. 14.

(*f*) God. p. 13.

next to him the Bishop of Winchester; and then all the other bishops of both provinces after the seniority of their consecration; but if any of them be a privy councillor, he shall take place next after the Bishop of Durham (*g*).



SECT. 4.—*Form and Manner of making and consecrating Archbishops and Bishops.*

A general historical summary has already been given of the changes made from time to time in the history of the church as to the election of bishops (*h*).

This history ends in the canons in cathedral churches obtaining the election of their bishops; which elections were usually confirmed at Rome (*i*).

Coming now particularly to England, we read, that in the Saxon times, all ecclesiastical dignities were conferred by the king in parliament. Ingulphus, Abbot of Crowland, in the time of William the Conqueror, tells us, that for many years past there had been no canonical election of prelates, for that they were donative by delivery of the ring and pastoral staff; the one signifying that the bishop was wedded to the church; and the other was an ensign of honour, always carried before him, and was a token of that support which he ought to contribute to the church, or rather that he was now become a shepherd of Christ's flock.

Crown's right of patronage over bishoprics.

Lord Coke establishes the right of donation in the kings of this realm, upon the principle of foundation and property: for that all the bishoprics in England were of the king's foundation, and thereupon accrued to him the right of patronage (*k*).

So, according to this authority, also the bishoprics in Wales were founded by the Prince of Wales; and the principality of Wales was holden of the King of England as of his crown; and when the principality of Wales for treason and rebellion was forfeited, the patronages of the bishoprics there became annexed to the crown of England (*l*).

And in Ireland the bishoprics were donative by letters-patent.

Irish bishops.

The serious conflict between the church and the state on the subject of the delivery to the bishop of the ring and pastoral

Conflict of the investitures.

(*g*) 1 Inst. p. 94; 1 Ought. p. 486; 31 Hen. 8, c. 10, s. 3.

(*h*) Vide supra, p. 20, Election of bishops.

(*i*) Ayl. Par. p. 126.

(*k*) 1 Inst. pp. 134, 344.

(*l*) 1 Inst. p. 97. The question of the relation of the crown to colonial bishoprics is discussed hereafter.

staff, and the ceremony of homage ; in other words, the struggle between the ecclesiastical and feudal system, forms an interesting and important chapter in the history of England (*q*), as of other countries.

In England the resistance of Archbishop Anselm, in obedience to the pope, to Henry the first, ended in compelling that able monarch to give way on the subject of the ring and staff, and confine the regal power to exacting the ceremony of homage from the bishop, in respect of the temporalities of the see. The pope afterwards compelled King John to grant by charter that the bishops should be elected by the chapter ;—a grant confirmed by subsequent statutes. Which election by the chapter was to be a free election, but founded withal upon the king's *congé d'eslire*, and afterwards to have the royal assent ; and the new elected bishop was not to have his temporalities restored, until he had sworn allegiance to the king ; but it was agreed that confirmation and consecration should be in the power of the pope (*r*).

But not content with this power only of confirmation and consecration, the pope would oftentimes collate to the bishoprics himself ; whereupon by the statute of 25 Edw. 3, st. 4, it was enacted as follows : “The free elections of archbishops, bishops, and all other dignities and benefices elective in England, shall hold from henceforth in the manner as they were granted by the king's progenitors and the ancestors of other lords, founders of the said dignities and other benefices. . . . And in case that reservation, collation or provision be made by the court of Rome, of any archbishopric, bishopric, dignity or other benefice, in disturbance of the free elections, collations, or presentations aforementioned, that at the same time of the voidance that such reservations, collations, and provisions ought to take effect, our lord the king and his heirs shall have and enjoy for the same time the collations to the archbishoprics and other dignities elective which be of his advowry ; such as his progenitors had before that free election was granted ; since that the election was first granted by the king's progenitors upon a certain form and condition, as to demand licence of the king to choose, and after the election to have his royal assent, and not in other manner ; which conditions not kept, the thing ought by reason to resort to its first nature.”

Bishops elective by the deans and chapters (without the

Afterwards, by 25 Hen. 8, c. 20, s. 3, all papal jurisdiction whatsoever in this matter was entirely taken away ; by which it is enacted, that no person shall be presented and nominated to “the bishop of Rome, otherwise called the pope, or to the see of

(*q*) Dean Church, Essays on Anselm, William Rufus, and Henry 1.—Mozley, 1854.

(*r*) 1 Inst. p. 134 ; Gibs. p. 104 ; 3 Salk. p. 71.

Rome," for the office of an archbishop or bishop, but the same shall utterly cease, and be no longer used within this realm.

pope), by the king's sole nomination.

And the manner and order as well of the election of archbishops and bishops, as of the confirmation of the election and consecration, is clearly enacted and expressed by that statute.

Afterwards, by the statute of 1 Edw. 6, c. 2, all bishoprics were made donative again, as formerly they had been. This statute reciting that, "Forasmuch as elections of archbishops and bishops by the deans and chapters, . . . be as well to the long delay as to the great cost and charges of such persons as the king giveth any archbishopric or bishopric unto; and whereas the said elections be in very deed no elections, but only by a writ of *congé d'élire* have colours, shadows or pretences of elections, serving nevertheless to no purpose, and seeming also derogatory and prejudicial to the king's prerogative royal, to whom only appertaineth the collation and gift of all archbishoprics and bishoprics and suffragan bishops within his highness' said realms . . ." enacted, that from thenceforth no *congé d'élire* be granted, nor election by the dean and chapter be made, but that the king by his letters-patent may collate.

Then donative by the king alone, without election.

And it has been supposed by some, that the principal intent of this act was, to make deans and chapters less necessary; and thereby to prepare the way for a dissolution of them (s).

But this statute was afterwards repealed, and the matter was brought back again, and still rests upon the statute of the 25 Hen. 8, c. 20, as hereafter follows (t).

When a bishop dies, or is translated, the dean and chapter certify the king thereof in chancery, and pray leave of the king to make election (u).

Finally elective again by the dean and chapter, under the king's nomination. Notice of the avoidance. Leave to elect.

Upon which, it is enacted by the 25 Hen. 8, c. 20, s. 3, as follows: "that at every avoidance of any archbishopric or bishopric, . . . the king . . . may grant . . . to the dean and chapter . . . a licence under the great seal, as of old time hath been accustomed, to proceed to election of an archbishop or bishop (x) with a letter missive, containing the name of the person which they shall elect and choose; by virtue of which licence, the said dean and chapter . . . shall with all speed . . . in due form elect and choose the said person named in the letters missive, and none other; . . . and if they do defer or delay their election above twelve days next after such licence or letters missive to them delivered, that then for every such default the king's highness, his heirs and successors, shall nominate and present, by their letters-patent under their great seal, such a person . . . as they shall think convenient."

Nomination of the person to be elected. Election.

By sect. 4 of the same act the person so nominated by letters-

(s) Gibs. p. 113.

(t) 12 Co. p. 8.

(u) God. p. 29.

(x) Which licence is called *congé d'élire*: Terms de la Ley.

patent is to be invested and consecrated in like manner as if he had been elected by the dean and chapter.

Consent of
the person
elected.

After election then there must be the consent of the person elected: in order to which, the proctor, constituted by the dean and chapter, exhibits to him the instrument of election, and prays his assent to the same; which assent is to be given by an instrument in form, in the presence of a notary public (*y*).

Notification
of the election
by 25 Hen. 8.

And if the said dean and chapter do elect within twelve days as aforesaid, then they shall make certification thereof to the king under their common seal; after which certification, the person so elected shall be reputed and taken by the name of lord elected of the said dignity and office that he shall be elected to (*z*).

Sect. 6 of 25 Hen. 8, c. 20, provides as follows:—"And that if the . . . dean and chapter, . . . after such licence . . . shall be delivered to them, proceed not to election and signify the same according to the tenor of this act, within . . . twenty days next after such licence comes to their hands; or else if any of them admit or do any other thing contrary to this act, then every such dean and particular person of the chapter so offending, and every of their aiders, counsellors and abettors, shall incur a *premunire*" (*a*).

Mandate for
confirmation.

By sect. 4 of the act:—"And then making such oath and fealty only to the king's majesty, his heirs and successors, as shall be appointed for the same, the king's highness by his letters-patent under his great seal shall signify the said election, if it be to the dignity of a bishop, then to the archbishop . . . of the province . . . if the see of the said archbishop is full and not void; and if it be void, then to any other archbishop within this realm or in any other the king's dominions, requiring and commanding . . . to confirm the said election, and to invest and consecrate the person so elected to the office and dignity that he is elected unto, and to give and use to him all such benedictions, ceremonies, and other things requisite for the same without any suing . . . any bulls, letters or other things from the see of Rome for the same in any behalf. And if the person be elected to the . . . dignity of an archbishop . . . then" the king shall so signify the said election to "one archbishop and two other bishops, or else to four bishops within this realm or within any other the king's dominions, . . . requiring and commanding the said archbishop and bishop with all speed and celerity to confirm the said election, and to invest and consecrate the said person so elected to the office and dignity that he is elected unto, and to give and use to him such pall, benedictions, ceremonies, and all other things requisite to the same without suing any bulls, letters or other things at the said see of Rome" (*b*).

(*y*) Gibs. p. 110.

(*z*) 25 Hen. 8, c. 20, s. 4.

(*a*) Sect. 6.

(*b*) Sect. 4.

Such Oath and Fealty only to the King.] Instead of this, before the Reformation, an oath was taken to the pope and see of Rome, in these words: "I John, bishop or abbot of A., from this hour forward shall be faithful and obedient to St. Peter, and to the holy church of Rome, and to my lord the pope and his successors canonically entering. I shall not be of counsel nor consent, that they shall lose either life or member, or shall be taken, or suffer any violence or any wrong by any means. Their counsel to me credited by them, their messengers or letters, I shall not willingly discover to any person: The papacy of Rome, the rules of the holy fathers, and the regality of St. Peter, I shall help and maintain and defend against all men. The legate of the see apostolic, going and coming, I shall honourably entreat. The rights, honours, privileges, and authorities of the Church of Rome, and of the pope and his successors, I shall cause to be conserved, defended, augmented, and promoted. I shall not be in counsel, treaty, or any act in the which any thing shall be imagined against him or the Church of Rome, their rights, seats, honours, or powers. And if I know any such to be moved or compassed, I shall resist it to my power, and as soon as I can, I shall advertise him, or such as may give him knowledge. The rules of the holy fathers, the decrees, ordinances, sentences, dispositions, reservations, provisions, and commandments apostolic, to my power I shall keep, and cause to be kept of others. Heretics, schismatics, and rebels to our holy father and his successors, I shall resist and persecute to my power. I shall come to the synod when I am called, except I be letted by a canonical impediment. The thresholds of the apostles I shall visit yearly personally or by my deputy. I shall not alienate or sell my possessions without the pope's counsel. So God help me and the holy evangelists" (c).

It is true an oath was also taken to the king, which had a show of qualifying the oath to the pope; beginning thus, "I John, bishop of A., utterly renounce and clearly forsake all such clauses, words, sentences, and grants, which I have or shall have hereafter of the pope's holiness, of or for the bishoprick of A. that in any wise hath been, is, or hereafter may be, hurtful or prejudicial to your highness, your heirs, successors, dignity, privilege, or estate royal." And the rest is an oath of obedience to the king in temporal matters (d).

And the inconsistency of these two engagements seems to be what William Rufus declared in his time, in the case of Archbishop Anselm; that he could not possibly observe at the same time both the fidelity which he owed to him, and his obedience to the apostolic see (e).

Four Bishops.] That is, four at the least (f).

(c) 1 Burnet, Hist. Reform., Bk. II., Part I., p. 123, folio ed.; p. 249, ed. 1829.

(d) 1 Burnet, Hist. Reform. ubi supra.

(e) Gibs. p. 117.

(f) Gibs. p. 111.

Pull.] So that the form of consecrating according to the Roman pontifical (though without bulls from Rome) seems to have continued after the making of this act, viz. all Henry the eighth's reign, and till the establishment of the new form in the third year of Edw. 6 (*g*).

Confirmation
of bishop.

The method and order of confirmation will be best understood by a brief account of the several instruments exhibited and applied in the course of it:

(1) The king's letters-patent; by which the royal assent to the election is signified, and the archbishop required to proceed to confirmation.

(2) A citation against opposers; which (the time of confirmation being first fixed) is published and set up, by order, and in the name of the archbishop, at the church where it is to be held; as well to notify the day of confirmation, as to cite all opposers (if any there be) who will object against the said election, or the person elected, to appear on that day: according to the direction of the ancient canon law.

(3) The certificate or return made by the proper officer to the archbishop, of the due execution of the said citation.

(4) The commission to confirm; which is usually performed by the archbishop's vicar-general.

(5) The proxy of the dean and chapter; by which one or more persons are delegated by the dean and chapter electing, not only to present in their names the instrument of election to the bishop elected to obtain his consent, and to present the letters certificatory of election to the king, and to pray the royal assent in order to confirmation; but also at the time of confirmation (the said letters-patent, and commission to exhibit such his proxy, being first read) in virtue thereof to present the bishop elected to the archbishop, vicar-general or surrogate; and in the course of the confirmation, to do whatever else is necessary to be done on the part of the dean and chapter.

(6) The first schedule: The said proctor in the name of the dean and chapter, exhibiting the citation and return above mentioned, prays that the opposers (if any be) not appearing may be pronounced contumacious, and precluded from further opposition, and that the confirmation may be proceeded in; which is accordingly done by this schedule.

(7) A summary petition: This is the petition of the said proctor, that the bishop elect may be confirmed, upon his alleging and proving the regularity of the election, and the merits of the person elected; which he does in nine articles: setting forth, First, that the see was vacant, and had been vacant for some time. Secondly, that the dean and chapter, having first desired and obtained the royal licence, appointed a day for election, and duly summoned all persons concerned. Thirdly, that on that day, they unanimously chose the person

now to be confirmed. Fourthly, that the election was duly published and declared to the clergy and people there assembled. Fifthly, that, at the request of the dean and chapter, the person so elected gave his consent to the election. Sixthly, that the person elected is sufficiently qualified by age, knowledge, learning, orders, sobriety, condition, fidelity to the king, and piety. Seventhly, that the dean and chapter, under their seal, intimated the election, and the name of the person elected to the king. Eighthly, that the king had given the royal assent. Ninthly, that he had, by his letters-patent, required the person elected to be confirmed.

All which articles conclude with a petition, that, in pursuance of the premises, confirmation may be decreed.

Then the summary petition is admitted, and the court decrees to proceed thereupon, and assign him a term immediate, to prove the particular matters contained in the petition; for proof of which he exhibits the process of the election made by the dean and chapter, the consent of the archbishop or bishop and the royal assent; and then prays a time to be presently assigned for final sentence; which is decreed accordingly.

(8) The second schedule: Before sentence, a second præconization of the opposers (if any be) is made at the fore-door of the church, and (none appearing) they are declared contumacious, by a second schedule.

"But if any appear," Dr. Burn says, "it seemeth that they shall be admitted to make their exceptions in due form of law. To which purpose, a passage in Collier's Ecclesiastical History, vol. ii., p. 745, is applicable." This passage is as follows: "Soon after the recess of the parliament, Bishop Laud was translated from Bath and Wells to London, and Montague promoted to the see of Chichester. Before he was consecrated, an unexpected rub was thrown in the way. At the confirmation of bishops there is public notice given, that if any persons can object either against the party elected, or the legality of the election, they are to appear and offer their exceptions at the day prefixed. This intimation being given, one Jones, a bookseller, attended with the mob, appearing at the confirmation, excepted against Montague, as a person unqualified for the episcopal dignity. And to be somewhat particular, he charged him with popery, Arminianism, and other heterodoxies, for which his books had been censured in the former parliament. But Dr. Rives, who then officiated for Brent the vicar-general, disappointed this challenge. For Jones had made some material omissions in the manner, and not offered his objections in form of law. For the purpose, the exceptions were neither given in writing, nor signed by an advocate, nor presented by any proctor of the court. Upon the failure of these circumstances, the confirmation went on." "The parliament," (Dr. Burn says) "not at first apprised in point of form, were dissatisfied with the conduct of the vicar-general, and inquired

into the behaviour of Dr. Rives, on that occasion. Upon which it hath been observed, that Dr. Rives, a most eminent civilian and canonist, admitted that the opposition was good and valid, had it been legally offered; and that the parliament of that time proceeded upon the same opinion."

(9) The oaths and declarations according to the law as now altered are three in number: the oath of allegiance in conformity to the statutes of the realm (*h*); and the declaration of simony, and the oath of obedience to the archbishop in conformity to the rules and canons of the church (*i*).

(10) The definite sentence, or the act of confirmation; by which the judge commits to the bishop elected the care, governance, and administration of the spiritualties; and then decrees him to be installed or inthronized (*k*).

And this is performed (in the province of Canterbury) by mandate from the archbishop to the archdeacon of Canterbury; to whom the right of installing the bishops of that province has anciently belonged, and does still belong (*l*).

(11) Finally, a public notary, by the archdeacon's command, records the whole matter of fact in this affair, in an instrument to remain as authentic to posterity (*m*).

After election and confirmation, and not before, the bishop is fully invested to exercise all spiritual jurisdiction (*n*). But he may not sue for his temporalities till after consecration (*o*).

Dr. Hampden's Case.

In our own times the question as to the duty and power of the vicar-general to hear and decide upon objections duly taken to the confirmation of a bishop has been formally raised upon two (*p*) occasions—the confirmation of Dr. Hampden as Bishop of Hereford in 1848, and in that of Dr. Temple as Bishop of Exeter, December 11, 1869.

From the former of these instances a sufficient interval of time has elapsed to enable us to review with calmness the proceedings which took place.

There is no doubt that the appointment of Dr. Hampden excited, rightly or wrongly, the minds of political and religious parties throughout the kingdom in the highest degree. And the judgments delivered in the Court of Confirmation and in the Queen's Bench must be read with this fact present to the mind of the reader. A very accurate, careful, and full report (*q*)

(*h*) 31 & 32 Vict. c. 72, s. 2. See p. 9, *supra*.

(*i*) 28 & 29 Vict. c. 122.

(*k*) *Gibs.* pp. 110, 111; *God.* pp. 25, 26, 27.

(*l*) *Gibs.* p. 118.

(*m*) *God.* p. 27.

(*n*) *Gibs.* p. 114.

(*o*) *Wats.* c. 40, p. 423.

(*p*) There was a third occasion when opposition was made to the confirmation of Dr. Lee, the late

Bishop of Manchester, in St. James's Church, where prelates of the northern province are sometimes consecrated; but the vicar-general summarily refused to hear the objector, and no further proceedings were taken.

(*q*) A report of the case of the Right Rev. R. D. Hampden, D.D., Lord Bishop elect of Hereford, in Hereford Cathedral, the Ecclesiastical Courts and the Queen's Bench,

has been published of all the proceedings, beginning with the contested election of Dr. Hampden in the chapter of Hereford and ending with the refusal of the mandamus by the Queen's Bench.

The crown was successful in maintaining its appointment before every tribunal.

An unusual course was pursued with respect to the constitution of the Court of Confirmation. It is generally holden by the vicar-general alone; on that occasion two other civilians were by a commission united to the vicar-general.

The court refused to hear the objectors, who appeared in answer to the citation, and the very indecorous consequence was, that the public proclamation having been made by the officer of the court—"Oyez: All manner of persons who shall or will object to the confirmation of the election of the Reverend R. D. Hampden, D.D., to be the bishop and pastor of the cathedral church of Hereford, let them come forward and make their objections in due form of law, and they shall be heard"—the judges immediately and peremptorily refused to hear the objections made in due form of law. The confirmation was certainly attended with much scandal on this account.

The objectors duly applied to the Queen's Bench for a mandamus to the vicar-general to hear;—this being the usual and proper remedy where a visitor or any judge ecclesiastical refuses to entertain a suit on a subject cognizable by them.

Four judges of the Queen's Bench heard the application: two, Coleridge and Patteson, were of opinion that the mandamus should go; two, Denman and Erle, that it should not. But the least creditable or most remarkable circumstance was that this court refused to allow the question to be put in a form which would enable the objectors to have recourse to a court of error, and this, although a very recent statute, 6 & 7 Vict. c. 67, had been passed for the express purpose of enabling recourse to be had in questions of mandamus to a court of error. Mr. Justice Patteson said (*r*): "I think it" (*i.e.* the subject) "is admitted on all hands to be one of very great importance and difficulty, and for that reason very fit, as it appears to me, to be put into such a shape as to enable the unsuccessful party here to take the opinion of a court of error. The power of bringing a writ of error having been granted by a recent act, has materially affected the duty of this court, as it seems to me, in regard to writs of mandamus. Formerly, when the decision of this court was final, if the facts were not disputed and the law was fully argued on the motion for the writ, no advantage was gained by delaying the decision upon that law until a writ had issued and a return been made; but now, by refusing the writ, we prevent the party

by R. Jebb, Esq., M.A., of Lincoln's Inn, Barrister at Law. London, 1849; also reported as *Regina v. Abp. of Canterbury*, 11 Q. B. p. 483.

(*r*) Jebb's Report, p. 481. The whole of Mr. Justice Patteson's judgment should be studied, as containing a clear and able statement of the law.

applying for it from having the benefit of the recent statute, whereas, if we grant it, the other party has still that benefit, and therefore, as I think, we ought now to grant the writ as a general rule, unless we are quite clear that it cannot be sustained. I am fully aware of the agitation of men's minds, and of the strong feelings which are said to attend this case, and doubt not that much inconvenience would accrue from the ultimate decision of it being delayed; but I do not see that those are sufficient reasons for not putting the case into such a shape that recourse might be had to a court of error."

Dr. Temple's
Case.

It was probably in consequence of the general opinion that the forms of the vicar-general's court contemplated and provided for an objection being heard, and that the question of the mandamus ought at least to have been put in a shape to have been cognizable by a court of error, that in the case of Dr. Temple, more than twenty years after that of Dr. Hampden, the vicar-general of the archbishop allowed counsel to be heard upon the question whether the vicar-general had power to examine and decide upon objections raised in his court to the confirmation of a bishop (*s*). The vicar-general decided that he had no power to examine into any objections—a decision at variance with the opinions of Justices Coleridge and Patteson, but in harmony with that of Lord Chief Justice Denman and Justice Erle.

All the forms of the court imply that objections can be made and ought to be heard. The reason of the thing seems to point in the same direction. The question whether an appeal lies from the court of the vicar-general has not been formally decided. The inclination of Mr. Justice Patteson's opinion was adverse to the existence of any right of appeal. But inasmuch as by the general law (*t*) an appeal from all ecclesiastical courts lies to the crown in council, it is a question perhaps hereafter to be decided whether the vicar-general's court be from peculiar circumstances exempted from the application of this law.

The allegation and the judgment in the case of Dr. Temple are here given at length :

ALLEGATION.

"On Wednesday, the 8th day of December, 1869, before the Right Worshipful Sir Travers Twiss, Knight, D.C.L., Vicar-General and Official Principal of the most Reverend Father in God Archibald Campbell, by divine providence Lord Archbishop of Canterbury, Primate of all England and Metropolitan, in the Parish Church of St. Mary-le-Bow in the City of London, in

(*s*) The averments in the summary petition were in this case supported by affidavits.

(*t*) 25 Hen. 8, c. 19, s. 4, "for lack of justice at or in any of the courts of the archbishops of this realm, or in any the king's domin-

ions, it shall be lawful to the parties grieved to appeal to the king's majesty in the king's court of chancery," now represented by the judicial committee of the privy council.

the presence of Francis Hart Dyke, Notary Public, Principal Registrar of the Province of Canterbury :

“The business of confirming the alleged election of the Reverend Frederick Temple, clerk, doctor in divinity, to be bishop and pastor of the cathedral church of Exeter.

“On which day Edmund Charles Currey exhibited as proctor and made himself a party for the Right Reverend Walter John Bishop Trower, D.D., sub-dean of the cathedral church of Exeter, late Lord Bishop of Gibraltar, and late also commissary of the Right Reverend Father in God Henry Lord Bishop of Exeter, now deceased, the Reverend Samuel Henry Walker, clerk, M.A., vicar of the vicarage of Newton Poppleford, in the county of Devon and diocese of Exeter, and the Reverend Augustus Archer, clerk, vicar of the vicarage of St. John, Tipton, in the county and diocese aforesaid, three of the parties duly cited by and lawfully appearing in obedience to the letters mandatory issued and served in this business, and, by way of objection on opposition to the further proceeding of the said confirmation, did say, allege, and in law articulately propound, as follows, to wit :—

“First. That the said Frederick Temple is not a prudent and discreet man, and is not eminent for his knowledge of the holy scriptures, and is not, and cannot be greatly or at all useful and necessary to the cathedral church of Exeter. For that he did in or about the year 1860, write, print, publish, disperse, give, sell and set forth, or cause to be printed, published, dispersed, given, sold and set forth in a book called ‘Essays and Reviews’ a certain article, essay or review, entitled ‘The Education of the World,’ wherein he maintained and affirmed divers erroneous, strange and heretical doctrines, positions and opinions contrary to the doctrine and teaching of the United Church of England and Ireland as by law established, and contravening the statutes, constitutions and canons ecclesiastical of the realm, and against the peace and unity of the church, and which said article, essay or review is of a baneful tendency as weakening the foundations of Christian belief and likely to cause many to offend, and this was and is true, and the party propo-
nent doth allege and propound as before.

“Second. That the said book, entitled ‘Essays and Reviews,’ contained also six other articles, essays or reviews written by six other several authors and entitled respectively, ‘Bunsen’s Biblical Researches;’ ‘On the Study of the Evidence of Christianity;’ ‘Séances Historiques de Genève;’ ‘On Mosaic Cosmogony;’ ‘Tendencies of Religious Thought in England, 1688, 1750;’ and ‘On the Interpretation of Scripture.’ That in such six other articles, essays or reviews, are also maintained and affirmed divers erroneous, strange, and heretical doctrines, positions and opinions contrary to the doctrine and teaching of the said United Church of England and Ireland as by law established and contravening the statutes, constitutions and

canons ecclesiastical of the realm, and against the peace and unity of the church: and the said six other articles, essays, or reviews are all of a baneful tendency as weakening the foundations of Christian belief and likely to cause many to offend. That the said book containing as well the said article, essay, or review, entitled 'The Education of the World,' as also the said six other articles, essays, or reviews, has, between the years 1861 and 1869, been reprinted and republished as one entire book on eleven several occasions, the last or twelfth edition having been printed and published in the present year (1869), and that such several editions have been so printed and published with the knowledge of the said Reverend Frederick Temple; but notwithstanding the premises he the said Reverend Frederick Temple hath not at any time or in any manner expressed disapprobation of or dissent from any of the said erroneous, strange and heretical doctrines, positions and opinions maintained and affirmed therein, by reason whereof he hath given great offence and occasioned much scandal to the said church; and this was and is true, and the party proponent doth allege and propound as before.

"Third. That on the 21st day of June, 1864, the Upper House of Convocation of Canterbury did resolve as follows:— 'That the Upper House of Convocation having received and adopted the report of the committee of the whole house appointed by them to examine the volume entitled "Essays and Reviews," invite the lower house to concur with them in the following judgment: that this synod having appointed committees of the upper and lower houses to examine and report upon the volume entitled "Essays and Reviews," and the said committees having severally reported thereon, do hereby synodically condemn the said volume as containing teaching contrary to the doctrine received by the United Church of England and Ireland in common with the whole Catholic Church of Christ'; and on the 24th day of the said month of June, 1864, the lower house of the Convocation aforesaid did resolve as follows,—'that this house respectfully and heartily tender its thanks to his Grace the president, and to the bishops of the upper house for their care in defence of the faith, and that this house does thankfully accept and concur in the condemnation of the book by the upper house to which their concurrence has been invited by the upper house,' and this was and is true, and the party proponent doth allege and propound as before.

"Lastly. That all and singular the premises were and are true, public and notorious, and thereof there was and is a public voice, fame, and report, whereof legal proof being made at any meet and convenient time and place to be appointed by the judge for that purpose, the party proponent humbly prays that the said election may not now be confirmed, at least until such time as the said bishop elect shall publicly recant and disavow the aforesaid erroneous, strange, and heretical doctrines, posi-

tions, and opinions ; and that otherwise right and justice may be effectually done and administered to him and his said parties in the premises.

“ J. Parker Deane.”

“ Edmund C. Currey.

“ JUDGMENT (*u*).

The Vicar-General: “ I take upon myself the duty of confirming the election of the Reverend Frederick Temple, who has been elected to the See of Exeter, and in obedience to the letters mandate of the crown. Those letters mandate have been issued to his Grace the Archbishop of Canterbury. In those letters mandate it has pleased her Majesty the Queen to signify to his Grace the Archbishop of Canterbury that she has approved of the election of Doctor Temple to be bishop. She has likewise commanded him to confirm the election, and his grace the archbishop has issued to me, as vicar-general, his fiat to carry out the command of the queen. On these occasions it has been the practice to use judicial forms which, as far as we are able to ascertain, go back to the earliest period of the Reformation, and were probably framed by civilians of the day upon the ancient customs with reference to confirmation of bishops before the pope, and before archbishops in other countries. But they were framed also with a view to carry out the provisions of the statute ; and those forms it was considered his Grace the Archbishop of Canterbury might conveniently adopt for the purpose of confirming the election of Dr. Temple in this case. There has been no statutory sanction given to these forms. They are not obligatory upon the archbishop. He has been pleased to adopt them, and the practice for three centuries has been to use them. The practice has been, before the vicar-general takes his seat here, that a citation should go out calling upon all persons, who may choose to object to the election, or to the person elected, to appear here on a certain day, and state their objections. But they are informed that, notwithstanding their appearing, the confirmation will still take place. They are, therefore, informed beforehand, that they are to appear for the purpose of stating their objections, but not for the purpose of in any way having those objections entertained with a view to the confirmation being refused. It is, therefore, important to consider as such the intimation given to the opponents for what purpose they come here to-day. They come here to-day in my opinion to make such objections as may have arisen in their minds against the manner in which the election has been conducted. They come here to allege any defects which may be known to them, and also if there be any error with reference to the person who is presented to me to be confirmed, that that

(*u*) A full and, it is believed, accurate account of all the proceedings will be found in “ The John Bull ” of December 11, 1869.

error should be made known to me before I confirm the election. They come before his grace's vicar-general in order that if any ground of objection to the election is known to them, they shall, before the election is confirmed, make their objections, or take exception to the election on the ground that the election in regard to some matter of form has been defective, or that the person presented to me for confirmation is not the person on whom the choice of the crown has fallen; and upon whom the choice of the electors has also fallen. It has been said on behalf of the objectors to-day that if the objections they have to make to the person elected are not heard, the proceedings here are a scandal and a sacrilege. When that was said by the learned counsel I was obliged to intimate to him that I thought those were strong terms to use. It was formerly the custom in all courts in the land to commence their sittings with prayers. It has been the custom of the ecclesiastical courts to do the same thing. It is not because the Litany has been read here to-day that there is any peculiar sanctity supposed to be attached to these proceedings, nor do I think that, because I do not accede to the argument of the learned counsel who appears for the objectors, the proceedings of the court can be justly exposed to the harsh terms which have been used with reference to them. Forms of prayer have always been in use in such cases. They are used before the highest branch of the legislature. Both in the House of Lords and in the House of Commons, before the speaker takes his seat, the Litany is read, and, therefore, sitting here as vicar-general, I think it was quite right that it should be read on this occasion, but I desire it not to go forth to the English public that with reference to the proceedings which have taken place here to-day any peculiar sanctity is to be attributed to them on account of the Litany having been read, because that would be to leave the proceedings of to-day open to the very strong observations which have been made with reference to them. The question now arises, am I or am I not to admit this allegation to proof? Now it is remarkable that there is no writer on English law who has dealt with this subject of confirmation, and has given us the forms of proceedings to be observed in such cases, who has ever contemplated the appearance of opponents. Opponents may come, but the proceedings with reference to elections are now so carefully conducted, that there is no opportunity or occasion for opposition as regards the mode of election. There is no book, so far as I am aware, that tells us as a matter of practice what ought to be done in a case of this kind. On the occasion of the election of Dr. Hampden I was present as counsel. I was present both in that case and in the case of the opposition to Dr. Lee's election at St. James's Church, to which reference has been made, and therefore I speak from a personal knowledge of the subject. When the opponents appeared in the case of Dr. Hampden, Dr. Lushington, sitting as assessor for Dr. Burnaby, the then

vicar-general, assisted by Sir John Dodson, Master of the Faculties, refused to allow the proctor for the objectors to appear, upon the ground that his appearance would be futile, there being no power whatever to refuse to obey the mandate of the crown to confirm the election of Dr. Hampden. I have thought it better on this occasion to deviate so far from that precedent, as to allow Mr. Currey to appear before me on behalf of the parties objecting. He has been allowed to appear and to tender an allegation of objections, and I have permitted his counsel to state to me what is the substance of that allegation, and what is the object for which it is brought in. The substance of the allegation is to traverse the averments in the petition of the dean and chapter, which are in substance that the person before me is a fit and proper person to be elected. The objectors propose to traverse those facts, and call upon me to hear witnesses on both sides, to pronounce judgment in their favour, and to refuse to confirm the election of Dr. Temple. I am of opinion that I have no power whatever to review the choice of the crown in regard to Dr. Temple being a fit and proper person to be bishop of the see of Exeter. I think that what Dr. Spinks has said is most pertinent, and it is to my mind conclusive—that where parties believe that the choice of the crown has been erroneous, it is their duty to apply at an earlier stage than this to have the matter set right. I think it is their duty if they think the choice of the crown has been erroneous to go to her Majesty and beseech her, or humbly request her, not to issue her mandate for the confirmation of the election. Here her Majesty has approved of the election. She has signified to the archbishop her assent to it, and I now, acting on behalf of his grace, am invited by the objectors to reopen the large question as to the fitness of Dr. Temple to be bishop of the see of Exeter, to examine witnesses, to pronounce him to be an unfit person to be elected to the episcopal office, and to refuse to confirm his election of which the queen has signified her approval. I am of opinion that I have no such power. I have thought it right to hear counsel in this case. The objectors have had the assistance of a learned counsel, of whom I may say that if there be any member of the civil law bar, who could have supported the position for which he has contended it is Dr. Deane. I hold, however, that he has not met the question which I put to him in the course of his argument as to whether I have or have not power to grant his request. I believe that I have no power to do so; and that being so, I must reject the allegation and decree to proceed with the business of this allegation.”

The prescribed formalities for completing the confirmation were then duly observed, Dr. Temple kneeling and taking the oath of obedience, and afterwards making and subscribing the declaration against simony required in such cases.

Upon a translation all the aforesaid ceremonies are observed; Consecration. but consecration in that case is not requisite because the bishop

was consecrated before (x). But in the case of creation, the process goes on as follows:

The consecration shall always be performed upon some Sunday or holy-day (y).

As to the *place* of consecration; the dean and chapter of Canterbury claim it as an ancient right of that church, that every bishop of the province is to be consecrated in it, or the archbishop to receive from them a licence to consecrate elsewhere. And it is said that a long succession of licences to that purpose are regularly entered in the register of that church. And although between the years 1235 and 1300, that point was controverted with the chapter, it ended in their favour and in the further confirmation of the privilege, which was first granted by Thomas Becket, and afterwards confirmed by St. Edmund. And in Cranmer's register there is a memorandum, that no bishop may be consecrated without the church of Canterbury, but by the special licence of the dean and chapter of Canterbury under the chapter seal (z).

In order for consecration, the archbishop (or some other bishop appointed) shall begin the Communion Service; another bishop shall read the Epistle; and another bishop shall read the Gospel. And after the Nicene Creed and sermon, the elected bishop, vested with his rochet, shall be presented by two bishops unto the archbishop of that province or to some other bishop appointed by lawful commission (a).

Then shall the archbishop demand the king's mandate for the consecration, and cause it to be read (as in times past the pope's mandate was in like manner demanded, as is required in the pontifical) (b).

And then shall be ministered unto them the oath of due obedience to the archbishop, as follows:

In the name of God. Amen. I, N., chosen bishop of the church and see of P., do profess and promise all due reverence and obedience to the archbishop, and to the metropolitical church of C. and to their successors: so help me God, through Jesus Christ.

But this oath shall not be made at the consecration of an archbishop (c).

To the Archbishop and to the Metropolitical Church.] That is, either when the see is full, or else in the vacation when the whole archiepiscopal jurisdiction is vested in the dean and chapter (d).

But in the case of the consecration of a foreign bishop this oath cannot of course be administered, and with respect to the bishop appointed to a see in a British colony, in which the

(x) God. p. 29; Gibs. p. 111.

(y) Form of Consecr.

(z) Gibs. p. 111.

(a) Form of Consecr.

(b) Form of Consecr.

(c) Ibid.

(d) Gibs. p. 117.

church is not established by law, the oath of obedience ought to be taken to his own metropolitan, if there be one in the colony.

Then after divers questions and answers touching the episcopal office and before the act of consecration, the bishop elect shall put on the rest of the episcopal habit (e).

According to the office in the 3 Edw. 6, the pastoral staff was delivered to the bishop; which delivery in the Roman pontifical is preceded by a consecration of the staff, and followed by the consecration and putting on of a ring in token of his marriage to the church; and of a mitre as an helmet of strength and salvation, that his face being adorned, and his head (as it were) armed with the horns of both testaments, may appear terrible to the adversaries of the truth, as also in imitation of the ornaments of Moses and Aaron; and of gloves, in token of clean hands and heart to be preserved by him. All which, and many other like ceremonies, our church has laid aside; retaining only such as are most ancient and most grave (f).

The act 25 Hen. 8, c. 20, s. 6, proceeds to enact in substance that if any archbishop or bishop, after such election, nomination or presentation shall be signified unto them by the king's letters-patent, shall refuse and do not confirm, invest and consecrate with all due circumstance as aforesaid, within twenty days next after the king's letters-patent of such signification or presentation shall come to their hands; or if any of them, or any other person or persons, omit or do any other thing contrary to the statute of the 25 Hen. 8, c. 20, in such case every person so offending, their aiders, counsellors and abettors, shall incur the penalties of the statutes of *præmunire* (g).

Delay or refusal to consecrate.

By canon 8 of 1603: "Whoever shall affirm or teach that the form and manner of making and consecrating bishops, priests and deacons, containeth anything in it that is repugnant to the word of God; or that they who are made bishops, priests or deacons in that form, are not lawfully made, nor ought to be accounted either by themselves or others to be truly either bishops, priests or deacons, until they have some other calling to those divine offices; let him be excommunicated *ipso facto*,

Form of consecration binding.

(e) Form of Consecr.

(f) Gibs. p. 118. But at the end of the Common Prayer Book, established by parliament in the second year of Edw. 6, it is ordered, that whensoever the bishop shall celebrate the holy communion, or exercise any other public administration, he shall have upon him, besides his rochet, a surplice or alb, and a cope or vestment, and also his pastoral staff in his hand, or else borne or holden by his chaplain. And in the rubric before the Common Prayer in our present

liturgy, it is ordered, that such ornaments of the church, and of the ministers thereof at all times of their ministration, shall be retained and be in use, as were in this Church of England by the authority of parliament, in the second year of the reign of King Edward 6.

(g) But it is said by Coleridge, J., in *Regina v. Abp. of Canterbury*, 11 Q. B. p. 609, that an archbishop would not be bound to obey a royal mandate to consecrate a colonial bishop.

not to be restored until he repent, and publicly revoke such his wicked errors."

And by the thirty-sixth of the Thirty-nine Articles: "The Book of Consecration of Archbishops and Bishops and Ordering of Priests and Deacons, lately set forth in the time of Edward VI., and confirmed at the same time by authority of parliament, doth contain all things necessary to such consecrating and ordering; neither hath it anything that of itself is superstitious and ungodly. And therefore whosoever are consecrated or ordered according to the rites of that book, since the second year of the forenamed King Edward unto this time, or hereafter shall be consecrated or ordered according to the same rites, we decree all such to be rightly, orderly and lawfully consecrated and ordered."

And by the Act of Uniformity, 14 Car. 2, c. 4, s. 26, all subscriptions to be made unto the Thirty-nine Articles shall be construed to extend (touching the said thirty-sixth article) to the book containing the form and manner of making, ordaining and consecrating of bishops, priests and deacons, in this said act mentioned, as the same did heretofore extend unto the book set forth in the time of King Edward VI.

Objection to
consecration.

In the case of Dr. Hampden's confirmation, among other grounds stated for the position that no objection could be legally taken was this, that in some cases the appointment to sees was by letters-patent, as in Ireland, and that in such cases there was no confirmation, but immediate consecration, and that then there was no room or opportunity for objection. But the reasoning of Mr. Justice Patteson on this point is conclusive. He says:—

"No mention is made in such case of confirmation; that is, in the case of letters-patent from the king. The legislature seems to have considered that confirmation was unnecessary where there had been no election, but the crown had nominated and presented by letters-patent. And this is not an oversight, as I apprehend; for in the Irish statute, 2 Eliz. c. 4, which abolishes election, even in form, altogether, and makes the appointment always by letters-patent, no mention of confirmation is made from the beginning to the end of the statute.

"Hence, however, arises another argument; and it is contended that as the legislature treats confirmation as unnecessary where the crown appoints the bishop directly and avowedly, namely, by letters-patent, it never can have intended that confirmation should be necessary as a judicial act, where the crown appoints the bishop indirectly and circuitously through the medium of a pretended election by the dean and chapter; therefore that the confirmation mentioned in the statute must be taken to be a ministerial act, and a mere form, that the form of confirmation was preserved because the form of election was; but neither was intended to be real or more than shadow.

"It is difficult to see why confirmation should be necessary where the crown appoints indirectly, if it was not considered so where the crown appoints directly, and if it was right to omit it in the one case, why it was not right in the other. It is vain to

conjecture the reasons which actuated the legislature at that time, and I do not pretend to reconcile or to account for all the provisions of this statute. Looking at the words used, I see nothing which imports that the confirmation and consecration were to be mere ministerial forms and shadows; they are both required in one and the same sentence and in the same language. I cannot bring myself to believe that the legislature of this country could ever intend that the solemn act of consecration should be a mere form and shadow; and if not, neither can confirmation be so, for one and the same interpretation must be put on the language which is applied equally to both. As to consecration, indeed, no previous form of inquiry is stated to have been used like that in the case of confirmation; nor am I prepared to say that any was necessary. The archbishop, where he had confirmed, would have already inquired, and where after this statute (which would rarely happen, indeed no instance has been cited in which it has ever happened) the crown appointed by letters-patent in default of election by the dean and chapter, he would in general be able to inform himself, without any public inquiry, as to the qualifications of the person nominated and presented by the crown; and if any lawful impediment to the consecration came to his knowledge, I cannot believe that the legislature intended to force him, knowingly and without regard to such impediment, to perform the solemn act of consecration" (h).

When a bishop is translated; the former see is not void by the election to the new one, until the election is confirmed by the archbishop; for though he is elected, yet it may happen that the king shall not consent, or the archbishop may not confirm; and it is not reasonable that the bishop should lose his former preferment till he has obtained a new one: and so it is in case of creation; he is not completely bishop till consecration (i).

Translation.

And the dignities or benefices which a bishop was possessed of before his election, become not void till after consecration in the case of creation; and after confirmation, in the case of translation. Upon which foundation it was that all the judges agreed, in the case of *Evans v. Ascuith*, that if a *commendam retinere* comes, in the former case before consecration, and in the latter case before confirmation, it comes in time enough; because it comes while the bishop is in possession of the dignity or benefice granted in *commendam* (k).

"... every person and persons being hereafter chosen elected nominate presented invested and consecrate to the dignity or office of any archbishop or bishop . . . according to the form tenure and effect of this present Act, and suing their temporalities out of the king's hands, his heirs or successors as hath been accustomed, and making a corporal

Installation and restitution of the temporalities.

(h) Jebb's Report, p. 481, vide supra.

(i) 3 Salk. p. 72.

(k) Palm. pp. 470, 475; W. Jones,

p. 162; Gibs. p. 114. The defendant's name in this case is variously given as Ascuith, Ascough, Askwith and Asciuth.

oath to the king's highness and to none other in form as is aforesaid, shall and may from henceforth be thrononized or installed as the case shall require; and shall have and take their only restitution out of the king's hands, of all the possessions and profits, spiritual and temporal, belonging to such archbishopric or bishopric, whereunto they shall be so elected or presented, and shall be obeyed in all things according to the name title degree and dignity that they shall be so chosen or presented to, and do and execute in every thing and things touching the same, as any archbishop or bishop of this realm, without offending the prerogative royal of the crown, and the laws and customs of this realm, might at any time heretofore do" (l).

Whereupon the bishop, being introduced into the king's presence, shall do his homage for his temporalities or barony; by kneeling down, and putting his hands between the hands of the king, sitting in his chair of state, and by taking a solemn oath to be true and faithful to his majesty, and that he holds his temporalities of him (m).

The old law as to subscriptions, declarations, and oaths to be taken by the clergy underwent, in 1865, a great change by the Clerical Subscription Act, 1865, 28 & 29 Vict. c. 122. This act provided that no oath should be administered during the service for the consecration of archbishops and bishops (s. 11); but this provision does not "extend to or affect the oath of canonical obedience to the bishop, or the oath of due obedience to the archbishop taken by bishops on consecration" (s. 12).

Benefice or
dignity
vacant by
the bishop's
promotion.

Upon promotion of any person to a bishopric, the king has a right to present to such benefices or dignities as the person was possessed of before such promotion; though the advowson belongs to a common person. And this right of presenting upon promotion by the king, as making the avoidance which would not otherwise happen, did spring from the practice of the popes, and is now an uncontested right of the crown; and has been established not only by long practice, but by many judgments upon full and solemn hearings (n).

This usage or law does not extend to the case of a person promoted to a colonial bishopric (o).

But in Ireland the law was, that a man should not be promoted to a bishopric there, until he had resigned all his preferments in England; by which resignation it seems that the king's presentation in such case was defeated.

In the case of *The Grocers' Company v. Backhouse and the Archbishop of Canterbury* it was determined, that where the advowson is in common, so that the patrons are to present by turns, the king's presentation does not pass for the turn of the otherwise rightful patron, but he shall have his turn in course as it shall fall out (p).

(l) 25 Hen. 8, c. 20, s. 5.

(m) God. p. 27.

(n) Gibs. p. 763.

(o) *Reg. v. Eton College*, 8 E. & B. p. 610; 4 Jur., N. S. p. 335;
27 L. J., Q. B. p. 132.

(p) Bl. p. 770.

SECT. 5.—*Concerning Residence at their Cathedrals.*

Bishops shall be at their cathedrals on some of the greater feasts, and at least in some part of Lent, as they shall find expedient for their souls' health (*q*). Residence.

Bishops shall abide at their cathedral churches, and officiate on the chief festivals, and on the Lord's days, and in Lent and in Advent; and shall visit their dioceses at fit seasons, correcting and reforming the churches, and consecrating and sowing the word of life in the Lord's soil (*r*).

Bishops shall be personally resident, to take care of the flock committed to their charge, and for the comfort of the churches espoused to them; especially on solemn days in Lent and Advent, unless their absence is required by their superiors, or for other just cause. That is, by their superiors, either ecclesiastical or secular (*s*).

SECT. 6.—*Concerning their Attendance in Parliament.*

By the above recited statute of 25 Hen. 8, c. 20, a bishop upon his election shall be reputed and taken as lord elected. Bishops lords of parliament.
And by divers other statutes, bishops are called peers of the land; one of the three estates of the realm; one of the greatest estates of the realm, and the like (*t*).

As to their right in general to sit and vote in parliament, this has been carried so far by some, that they have asserted that an act made in parliament, where the bishops have not been present, is not good. But this Lord Coke seems to have set in a proper and clear light (*u*). How far an act made without the bishops is good.

There are divers acts of parliament, says he, which appear to have been made by the king, lords temporal, and commons, without the lords spiritual; and it hath been objected that such are no acts of parliament; and for authority, the roll of parliament in the 21 Rich. 2, is cited, where it is said that divers judgments were heretofore undone, for that the clergy were not present. To this some have answered, that a parliament may be holden by the king, the nobles, and commons, and never call the prelates to it. But we hold the contrary to both these, and shall make it manifest by records of parliament, first, that the bishops ought to be called to parliament; and then, secondly, we shall show where acts of parliament are good without them.

To the first: every bishop hath a barony in respect whereof according to the law and custom of parliament he ought to be summoned to the parliament as well as any of the nobles of the realm.

(*q*) Lind. p. 131.

(*r*) Otho. Athon, pp. 55, 56.

(*s*) Ibid. p. 118.

(*t*) 25 Edw. 3, st. 6, c. 6; 1 Eliz. c. 3; 8 Eliz. c. 1; 4 Inst. p. 1.

(*u*) 2 Inst. pp. 585 *et seq.*

To the second, if they voluntarily absent themselves, then may the king, the nobles, and commons, make an act of parliament without them; as where any offender is to be attainted of high treason or felony, and the bishops absent themselves, and the act proceeds, the act is good and perfect.

Likewise, if they be present, and refuse to give any voices, and the act proceeds, the act of parliament is good without them.

Also, where the voices in parliament ought to be absolute, either in the affirmative or negative, and they give their voices with limitation or conditions, and the act proceeds, the act is good; for their conditional voices are no voices.

Of every of these Lord Coke produces examples out of the records and rolls of parliament.

Whether they sit in parliament in their temporal capacity only. Concerning the point, whether they sit in parliament in their temporal capacity only, by reason of their temporal baronies: or in their spiritual capacity also, as bishops; the substance of what has been said seems to be as follows.

Lord Coke says, The lords spiritual, viz. archbishops, and bishops, being twenty-four in number, sit in parliament by succession, in respect of their counties, or baronies parcel of their bishoprics. And every one of these, when any parliament is to be holden, ought *ex debito justitiæ* to have a writ of summons. And they make their proxy as other lords of parliament (*r*).

And again: Every archbishopric and bishopric in England are of the king's foundation, and holden of the king *per baroniam*; and in this right the archbishops and bishops are lords of parliament; and this is a right of great honour that the church now hath (*x*).

And this, says Dr. Gibson, is true; but not the whole truth. For, although their baronies did put them more under the power of the king, and under a stricter obligation to attend; yet long before William the Conqueror changed bishoprics into baronies, they were, as bishops, members of the *mycel-synod* or *witena-gemot*, which was the great council of the land. And an argument of their spiritual capacity in parliament is, that from the reign of Edw. I. to Edw. IV. inclusive, as appears by the records, great numbers of writs to attend the parliament were sent to the guardians of the spiritualities, during the vacancies of bishoprics, or while the bishops were in foreign parts. The writs of summons also preserve the distinction of *prelati* and *magnates*; and whereas temporal lords are required to appear *in fide et ligeantia*, in the writs to the bishops the word *ligeantia* is left out, and the command to appear is *in fide et dilectione* (*y*).

And in 3 Salk. 73, it is said that bishops did sit and had a vote in parliament, in the time of the Saxons; but it was not in respect of any barony, but by a personal privilege, as they were

(*v*) 1 Inst. p. 97; 4 Inst. pp. 1, 12.

(*x*) 2 Inst. p. 3.

(*y*) Gibs. p. 127; Selden, Tit. of Hon. p. 575.

bishops ; for they were not barons until the Norman reign ; for in the reign of the Saxons they were free from all services and payments, excepting only to castles, bridges [and as it should have been added, expeditions] ; but William the Conqueror deprived them of this exemption, and instead thereof turned their possessions into baronies, and made them subject to the tenures and duty of knight's service.

Unto all which may be added what Lord Hale delivers, in a manuscript treatise touching the right of the crown, as set forth by Dr. Warburton, Bishop of Gloucester, in his "Alliance between Church and State" (z), as follows :—"The bishops sit in the House of Peers by usage and custom ; which I therefore call usage, because they had it not by express charter, for then we should find some. Neither had they it by tenure ; for, regularly, their tenure was in free alms, and not *per baroniam* ; and, therefore, it is clear they were not barons in respect of their possessions, but their possessions were called baronies, because they were the possessions of customary barons. Besides, it is evident that the writ of summons usually went *electo et confirmato*, before any restitution of the temporalities ; so that their possessions were not the cause of their summons. Neither are they barons by prescription ; for it is evident that as well the lately erected bishops, as Gloucester, Oxon, &c. had voice in parliament, and yet erected within time of memory, and without any special words in the erection thereof to entitle them to it. So that it is a privilege by usage annexed to the episcopal dignity within the realm ; not to their order, which they acquire by consecration ; nor to their persons, for in respect of their persons they are not barons ; nor to be tried as barons ; but to their incorporation and dignity episcopal."

When the creation of the new sees of Ripon and Manchester was proposed to be effected by 6 & 7 Will. 4, c. 77, it was intended by the union of the sees of Gloucester and Bristol and St. Asaph and Bangor to avoid an addition to the number of bishops who sat in parliament. The act 10 & 11 Vict. c. 108, continued the sees of St. Asaph and Bangor as separate bishoprics and established the see of Manchester, but with the following very important provision as to the seats of bishops in the House of Lords.

"The number of lords spiritual now sitting and voting as lords of parliament shall not be increased by the creation of the bishoprick of Manchester ; and whenever there shall be a vacancy among the lords spiritual by the avoidance of any one of the sees of Canterbury, York, London, Durham, or Winchester, or of any other see which shall be filled by the translation thereto from any other see of a bishop at that time actually sitting as a lord of parliament, such vacancy shall be supplied by the issue of a writ of summons to the bishop who shall be elected to the

Number sitting in parliament not to be increased.

10 & 11 Vict. c. 108.

(z) Bp. Warburton, Works, ed. 1811, vol. vii. bk. 2, p. 130.

same see; but if such vacancy be caused by avoidance of any other see in England or Wales, such vacancy shall be supplied by the issue of a writ of summons to that bishop of a see in England or Wales who shall not have previously become entitled to such writ; and no bishop who shall be hereafter elected to any see in England or Wales, not being one of the five sees above named, shall be entitled to have a writ of summons, unless in the order and according to the conditions above prescribed" (z).

41 & 42 Vict.
c. 58.

Similar provisions were contained in the acts for St. Albans and Truro already mentioned (a). And now by the Bishoprics Act, 1878 (41 & 42 Vict. c. 68), s. 5, "The number of lords spiritual sitting and voting as lords of parliament shall not be increased by the foundation of a new bishopric in pursuance of this act; and whenever there is a vacancy among such lords spiritual by the avoidance of any of the sees of Canterbury, York, London, Durham, or Winchester, such vacancy shall be supplied by the issue of a writ of summons to the bishop acceding to the see so avoided; and if such vacancy is caused by the avoidance of any see other than one of the five sees aforesaid, such vacancy shall be supplied by the issue of a writ of summons to that bishop of a see in England who having been longest bishop of a see in England has not previously become entitled to such writ: Provided, that where a bishop is translated from one see to another, and was at the date of his translation actually sitting as a lord of parliament, he shall not thereupon lose his right to receive a writ of summons to parliament."

A bishop may
sit in parlia-
ment upon
confirmation,
but not
before.

A bishop confirmed may sit in parliament as a lord thereof. It is laid down by Lord Coke that a bishop elect may so sit; but in the case of *Evans v. Ascuith* (b), before mentioned, Jones held clearly that a bishop cannot be summoned to parliament before confirmation, without which the election is not complete. And he adds, that it was well known that Bancroft, being translated to the bishopric of London, could not come to parliament before his confirmation. However, if a bishop may come presently after confirmation, and before homage and restitution of temporalities, he comes as soon as he is invested with the spiritualities, and is not of necessity to wait for his temporalities, which is a further argument of a spiritual as well as temporal capacity in parliament (c).

Bishops
translated
pay no new
fees in par-
liament.
Bishops'

Bishops being translated, pay no new fees upon their being introduced into parliament. This, with the like order for peers raised to higher dignities, was made a standing rule, when a table of fees was settled in the year 1663 (d).

Anciently, the greatest part of the bishoprics in England had

(z) 10 & 11 Vict. c. 108, s. 2.

(a) Vide supra, p. 28.

(b) Palm, p. 470; W. Jones,

p. 162.

(c) Gibs. p. 128.

(d) Gibs. p. 120.

seats (or, as they were commonly called, places) in or near London, in which they were resident during their attendance on parliament, on the court, or their own proper occasions; and during those attendances, they might freely exercise jurisdiction in their respective places, as in their own proper dioceses; and this is referred to in the statute of 33 Hen. 8, c. 31, for dis-severing the bishopric of Chester from the archbishopric of Canterbury, in which there is this clause, "saving to the bishop of Chester and his successors, that his house at Weston being within the diocese of Coventry and Litchfield, shall be accounted and taken to be of his diocese, and that he being resident in the same, shall be taken and accounted as resident in his own diocese, and for the time of his abode there shall have jurisdiction in the same; likewise as all other bishops have in the houses belonging to their sees wheresoever they lie in any other bishopric within this realm for the time of their abode in the same."

places of residence during attendance in parliament.

But now most of those houses are either exchanged, or (being built into private houses) are held in lease of the bishoprics to which they belonged; and no houses, now remaining, come in the circumstance here mentioned (of being a place of residence, in another diocese) but Lambeth House and Croydon, belonging to the Archbishop of Canterbury (and made part of his diocese by virtue of 6 & 7 Will. 4, c. 77); Winchester Place, when Dr. Burn wrote, "now removed from Southwark to Chelsea," and now in St. James's Square (lately sold under the provisions of 38 & 39 Vict. c. 34, s. 2); and Ely House, formerly in Holborn, now in Dover Street (e).

This subject underwent much discussion in Lord Stowell's judgment in *Barton v. Wells* (f), which established the jurisdiction of the Bishop of London over Ely Chapel, and overruled an attempt to set up an exemption from it on the ground of ancient privileges allowed to the bishops of Ely in virtue of their episcopal residence, which it decided to be a personal and not a local privilege, and therefore extinguished by a transference of the property to other hands. During the course of this judgment, Lord Stowell expresses his opinion that even this personal privilege has now become extinct (g).

Privileges of episcopal residences.

Barton v. Wells.

It is enacted by statute that, "The bishops shall sit in parliament on the right side of the parliament chamber, in this order: first, the Archbishop of Canterbury; next to him, on the same form, the Archbishop of York; then the Bishop of London; then the Bishop of Durham; then the Bishop of Winchester; then all the other bishops after their ancienties" (h).

Order of their sitting in parliament.

(e) *Gibs.* p. 132.

(f) 1 *Consist.* p. 21. The act 12 *Geb.* 3, c. 43, ss. 13, 14, provides that the bishop may continue to exercise his appellate jurisdiction, as visitor of certain colleges in Cambridge; and also

directs that payment of the reserved rents belonging to his see may be made in the new episcopal residence, Ely House, Dover Street.

(g) 1 *Consist.* p. 31.

(h) 31 *Hen.* 8, c. 10, s. 3.

Whether they
may vote in
cases of blood.

By a canon of the Council of Toledo, no bishop, or abbot, or any of the clergy, was to be a judge in case of life or limb (*i*).

This canon is said to have been introduced into England by Archbishop Lanfranc; and confirmed in a synod held at London, and made a standing rule of the English Church (*k*).

And this the clergy claimed as an exemption and privilege; and esteemed their attendance in parliament generally as a badge of ecclesiastical slavery (*l*).

And in the case before us, as they did apprehend themselves under an indispensable obligation to the canon, the king gave them leave to withdraw: nevertheless, by the eleventh constitution of Clarendon, they were required to be present until judgment was to be given (*m*).

Afterwards, by a constitution of Archbishop Langton, it was enjoined, that no clergyman should exercise secular jurisdiction, especially in cases of blood (*n*).

And by a constitution of Othobon:—"In causes of blood also, in which judgment of death or mutilation of members is given, we enjoin that none of the clergy presume to be a judge or assessor; on pain that besides the suspension from his office which he shall *ipso facto* incur, he shall be otherwise punished according to the discretion of his superior; from which sentence of suspension he shall in no wise be absolved . . . unless he first make a competent satisfaction" (*o*).

And in consequence of the aforesaid canons, the archbishops and bishops were wont to withdraw, when causes of blood were to be heard: with a protestation, nevertheless, that such absence should not be any infringement of their right to sit and vote in such cases, if the canons were out of the question (*p*).

And in fact, there are several instances, wherein bishops did sit and vote, or wherein their right was acknowledged to sit and vote, in like cases.

As in the 4 Edw. 3, Roger de Mortimer, Berisford, Maut-revers, and others, were adjudged traitors, by bishops and others in parliament.

In the 15 Edw. 3, Archbishop Stratford was acquitted of treason in parliament, by four earls, four bishops, and four barons.

In the 5 Hen. 4, the commons thank the lords spiritual and temporal, for their good and rightful judgment in freeing the Earl of Northumberland.

In the 3 Hen. 5, the commons pray judgment of the lords spiritual and temporal on the Earl of Cambridge.

In the 5 Hen. 5, Sir John Oldecastle was attainted of treason and heresy, by the lords spiritual and temporal.

(*i*) Gibs. p. 125.

(*k*) Ibid.

(*l*) Ibid.

(*m*) Ibid.

(*n*) Lind. p. 269.

(*o*) Otho. Athon, p. 92.

(*p*) Gibs. p. 125.

Nevertheless, Lord Coke says generally, in cases of trial for treason, misprision of treason, or felony, the lords spiritual must withdraw, and make their proxies (*q*).

But Dr. Gibson observes, that when the bishops entered their protestation and withdrew, neither the temporal nor spiritual lords understood them to be under any engagement to withdraw, from any law of the land. And much less can it be pretended, he says, that they are under any legal obligation in our reformed church; since the canon itself (speaking of the canon of the Council of Toledo), at first founded in superstition, and now probably abolished by law, as being to the damage or hurt of the king's prerogative royal, was disregarded for a long time after the Reformation. It is true, in the tumultuous times of King Charles the First, this advantage, among many others, was taken and insisted on, against the ecclesiastical state. But when it came to be a question in the reign of King Charles the Second, the most eminent civilians of that time were advised with by the bishops in convocation, and unanimously gave an opinion under their hands, that by their staying in the House of Lords, while cases of high treason were in agitation there, they were in no danger of irregularity; which was the ancient penalty annexed to the canon (*r*).

And Mr. Hawkins, speaking of this matter, says thus: "It is agreed, that at a trial before the House of Peers every temporal lord who hath a right to vote in that house, hath a right to pass on such trial. But it is said in the Year Book of 10 Edw. 4, 6, pl. 17, That upon the trial of a peer in parliament, the bishops shall make a procurator, because they cannot consent to the death of a man; but this is said to be wholly grounded on a canon not in force at this day; neither do I find any precedent wherein they have been excluded against their consent, or have withdrawn themselves without a protestation of their right, or making a proxy; and the judgment against the Spencers was expressly reversed for this reason among others, because the bishops were not present; and in the precedents chiefly insisted on of the other side, it is not expressly said that they were not present, and it doth not clearly appear, but that they might be included under the word peers. However it hath been always admitted, that they have a right to vote in a bill of attainder; also in the Earl of Danby's case, they were adjudged by the House of Lords to have a right to vote in questions previous to the trial of a peer, though this was strongly opposed by the House of Commons. And their right to vote at the trial itself, if they think fit, seems fully implied in the statute of the 7 Will. 3, c. 3, which enacts, That 'upon the trial of any peer or peeress for treason or misprision, all the peers who have a right to sit and vote in parliament shall be summoned twenty days at least before every such trial, to appear at every such trial, and that every peer so summoned and appearing shall vote

(*q*) 3 Inst. p. 31.

(*r*) Gibs. p. 125.

in the trial, every such peer first taking the oaths of allegiance and supremacy, and subscribing and repeating the declaration against popery,'”^(s).

But upon this, Sir Michael Foster (after having stated the difference between a trial before the court of the high steward, and a trial in full parliament, or before the king in parliament, and the mischief which this act was designed to remedy) observes as follows: “The words of the last clause (*ss*) are very general, and seem to exclude every proceeding in full parliament for the trial of a peer in the ordinary course of justice. But that construction was rejected in the cases of the Earls of Kilmarnock and Cromartie, and of the Lord Balmerino. And accordingly all the peers and lords spiritual were summoned. And those lords who appeared having taken the oaths appointed by the act, the bishops upon the day the trial came on, after making the usual protestation, withdrew. And the prisoners before their arraignment were informed by the high steward, that they were entitled to the benefit of this act in its full extent.” The summoning the lords spiritual to the trial of those lords was (Sir Michael says) he apprehends a prudent caution, in order to obviate a doubt that might otherwise at that critical time have arisen from the words of the statute, which (as was before observed) are very general. He continues, “The act provideth, that every peer so summoned and appearing shall vote in the trial. By voting in the trial, must be meant voting throughout the trial, voting as a competent judge, in every question that shall arise during the trial; and above all, in the grand question for condemnation or acquittal. Now upon this last question the bishops cannot vote. Though it hath been resolved, and practice hath established the rule, that in a proceeding in full parliament in a case of blood, they may, if they choose it, vote upon all previous questions. But in a proceeding in the court of the high steward, which, I conceive, this clause of the statute had principally in contemplation, and to which no mere spiritual lord was ever summoned or could be, no question but for acquittal or condemnation is the subject of any vote. For in all points of law or practice, the high steward gives the rule, as sole judge in the court. To conclude this head, the act may with propriety enough be said to regulate the proceeding in both courts, that of the high steward, and that in full parliament; but it doth not alter the nature and constitution of either. Consequently, it doth not give to the lords spiritual any right in cases of blood, which they had not before”^(t).

Whether they shall be tried by the lords in parliament or by a jury.

Sir William Staundforde says thus: Duchesses, countesses, and baronesses, shall be tried as peers of the realm; but so shall not bishops: for none of the statutes relating thereunto have

^(s) 2 Hawk. p. 423.

^(ss) *I. e.*, sect. 12, “that neither this act or anything therein contained shall be construed to extend to any impeachment or other pro-

ceeding in parliament in any kind whatsoever.”

^(t) *Fost. Crown Law*, p. 247. See also *Gibs.* p. 133; *Tr. per Pais*, p. 12.

been put in use to extend to bishops, albeit they enjoy the name of lords of parliament; for they have not this name by reason of nobility, but by reason of their office, and have not a place in parliament in respect of their nobility, but in respect of their possession, viz. the ancient baronies annexed to their dignities (*u*).

Lord Coke says: "Every lord of parliament, and that hath voice in parliament, and is called thereunto by the king's writ, shall not be tried by his peers, but only such as sit there by reason of their nobility, as dukes, marquisses, counts, viscounts or barons, and not such as are lords of parliament *ratione baroniarum quas tenent in jure ecclesie*, by reason of their baronies which they hold in the right of the church, as archbishops and bishops, and in time past some abbots and priors; but they shall be tried by the country, that is, by freeholders, for that they are not of the degree of nobility" (*x*).

Lord Hale, in the manuscript before quoted (*y*), says, that the bishops, in respect of their persons, are not barons, nor to be tried as barons.

And the late Mr. Madox, in a manuscript now in the British Museum, concerning the "Antiquity of passing Bills in Parliament," speaking of this matter of bishops, says, that out of parliament, their honour not being inheritable, they are to be tried by ordinary freeholders.

On the other hand, Mr. Hawkins observes as follows: "It is said by Staundforde and Coke, that those who are lords of parliament, not in respect of their nobility, but of their baronies which they hold of the crown, as bishops now do, and some abbots and priors did formerly, are not, within the intent of *Magna Carta*, to be tried by the peers. And Selden seems clear, that this is the only privilege which bishops have not in common with other peers. And those who seem most for the contrary opinion admit that the law hath been generally so taken. Neither do they produce any precedent, where a bishop or abbot hath been tried by the peers upon a commission; but on the contrary admit that there are two precedents of their being tried by the country or a jury. And it is said by others, that there are divers precedents of this kind; yet Selden, with his utmost diligence, seems able to produce but two which clearly and fully come up to his point, viz. those of Archbishop *Cranmer* and Bishop *Fisher*. However it seems to be agreed, that while the parliament is sitting a bishop shall be tried by the peers" (*z*).

Finally, Lord Chief Baron Gilbert, in his treatise on the Court of Exchequer (*a*), says thus: "But the bishops generally claimed an ecclesiastical privilege, to be tried only by the archbishop as their ordinary; therefore in the case of *Mark*, Bishop of *Carlisle*, where this challenge was made of the liberties of the church, and

(*u*) Staund. p. 153.

(*x*) 1 Inst. p. 31; 3 Inst. p. 30.

(*y*) Vide supra, p. 55.

(*z*) 2 Hawk. p. 424.

(*a*) Page 40.

overruled, he did not challenge his peerage. And so was the case of *Fisher*, Bishop of *Rochester*, in Henry VIII. . . . for they would not make any challenge to be tried by their peers, for that would have admitted a temporal jurisdiction: so by non-user of any right of being tried by their peers in capital cases, these bishops who held *per baroniam*, and had consequently a privilege to have such a trial, totally lost the same, and are tried by a common jury."

De Scandalis Magnatum.

What courts might write to the bishop to certify.

Prelates were included by name in the quite recently repealed statutes which gave the actions *de scandalis magnatum* (b).

None but the king's courts of record, as the Court of Common Pleas, the King's Bench, justices of gaol delivery and the like, could write to the bishop to certify bastardy, loyalty of matrimony, and the like ecclesiastical matters when the bishop's court had cognizance of them, for it was a rule in law, that none but the king can write to the bishop to certify, and therefore no inferior court, as London, Norwich, York or any other incorporation. And this was done in respect of the honour and reverence which the law gave to the bishop, being an ecclesiastical judge, and a lord of parliament (c). But the bishops and their courts have ceased to have any jurisdiction in cases of matrimony.



SECT. 7.—*Spiritualities of Bishoprics in the Time of Vacation.*

What meant by guardian of the spiritualities.

When a bishop dies, or is translated, or is employed beyond the seas in negotiations for the service of the king and kingdom, the law takes care to provide a guardian as to the spiritual jurisdiction, during such vacancy of the see or remote absence of the bishop, to whom presentations may be made, and by whom institutions, admissions, and the like, may be given. And this is that ecclesiastical officer, whether he be the archbishop, or his vicar-general, or deans and chapters, in whomsoever the office resides, whom we commonly call the guardian of the spiritualities (d).

Who shall be guardian of the spiritualities.

By the canon law, the dean and chapter are guardians of the spiritualities during the vacancy. And it has been allowed, that of common right they are so at this day in England, and that the archbishop has this privilege only by prescription or composition (e).

And divers deans and chapters do challenge this by ancient charters from the kings of this realm (f).

As to Durham, there has been a controversy of long standing

(b) 2 Rich. 2, c. 5; 12 Rich. 2, c. 11; repealed by 50 & 51 Vict. c. 59.

(c) 1 Inst. p. 134.

(d) God. Introd. p. 9; God. p. 39.

(e) 2 Inst. p. 15; Wood, bk. i. ch. 3; Johns. p. 56.

(f) God. p. 39.

between its dean and chapter and the Archbishop of York. In 1590 the Delegates seem to have held that the guardianship of the spiritualities was with the archbishop (*g*). But in 1672 it was solemnly determined on an issue in prohibition that the dean and chapter of Durham had the guardianship (*h*).

In Lincoln, by an ancient composition or custom, the dean and chapter certify the vacancy of the see to the archbishop, and nominate three of their body as fit persons to be appointed official during the vacancy, and pray him to appoint one. The archbishop does so, usually appointing the dean, and appoints the registrar of the dean and chapter, by a separate commission, registrar.

But now generally here in England, during the vacancy of any see within his province, the archbishop is guardian of the spiritualities, as has been said, by prescription or composition, whereby all episcopal rights of the diocese belong unto him, and all ecclesiastical jurisdiction is exercised by him or his commissioners for that time (*i*).

But when an archiepiscopal see is vacant, the dean and chapter of his diocese are guardians of the spiritualities; that is, the spiritual jurisdiction of his province and diocese is committed to them (*k*).

And by 25 Hen. 8, c. 21, s. 10, when the see of the arch-
bishopric of Canterbury is void, the guardian of the spiritualities shall grant faculties, licences, and dispensations, throughout both provinces, as the archbishop might have done. His power.

The guardian of the spiritualities has all manner of jurisdiction of the courts, and the power of granting licences to marry, during such vacancy; and also of granting admissions and institutions; but he cannot as such consecrate, or ordain, or present to vacant benefices, or confirm a lease (*l*).

And he shall have the perquisites that happen by the execution of such power, until the new elected bishop may by law execute the same (*m*). And perquisites.

After election and confirmation (and not before) the bishop is fully invested with a right to exercise all spiritual jurisdiction; and, consequently, then the power of the guardian of the spiritualities ceases (*n*). When his power ceases.

(*g*) Rothery, Return, No. 5; but see also No. 4.

(*h*) *Dean and Chapter of Durham's case*, 1 Vent. p. 234.

(*i*) God. pp. 39, 42; Ayl. Par. p. 125.

(*k*) God. p. 41.

(*l*) God. pp. 21, 39; Wood, bk. i. ch. 3.

(*m*) Wats. c. 40, p. 421.

(*n*) Gibs. p. 114.



SECT. 8.—*Temporalities of Bishoprics in the Time of Vacation.*

What is
meant by
temporalities.

A bishop's temporalities are all such things as the bishops have by livery from the king, as castles, manors, lands, tene-ments, tithes, and such other certainties, of which the king is answered during the vacation (o).

Who has the
custody of the
temporalities.

The custody of the temporalities of every archbishopric and bishopric within the realm, and of such abbeys and priories as were of the king's foundation, after the same became void, belonged to the king during the vacation thereof, by his pre-rogative; for as the spiritualities belonged during that time to the dean and chapter of common right, or to some other eccle-siastical person by prescription or composition; so the tempo-ralities came to the king, being patron and protector of the church, in so high a prerogative incident to his crown, as no subject can claim the temporalities of an archbishopric or bishopric when they fall, by grant or prescription (p).

Who has the
profits thereof
during the
vacation.

And upon the filling of a void bishopric, not the new bishop, but the king, by his prerogative, has the temporalities thereof, from the time that the same became void, to the time that the new bishop shall receive them from the king (q).

And by the statute *De Prerogativâ Regis*, c. 16, otherwise called 17 Edw. 2, st. 1, c. 14, "The king shall have escheats of lands of the freeholders of archbishops and bishops, when such tenants be attainted for felony in time of vacation, whilst their temporalities were in the king's hands to give at his pleasure, saving to such prelates the service that thereto is due and accustomed."

Accordingly, the temporalities being in Queen Elizabeth's hands, a copyhold escheated, which was granted by the queen, and it was held to be good (r).

Committing
waste, during
the vacation.

Ranulph, chaplain to King William Rufus, and afterwards by him made Bishop of Durham, was a factor for the king in making merchandize of church livings, inasmuch as when any arch-bishopric, bishopric or monastery became void; first he persuaded the king to keep them void a long time, and converted the profits thereof sometime by letting, and sometime by sale of the same, whereby the temporalities were exceedingly wasted and de-stroyed; secondly, after a long time no man was preferred to them by delivery of the ring and staff, by livery of seisin, freely, as the old fashion was, but by bargain and sale from the king, to him that would give most; by means whereof the church was stuffed with unworthy and insufficient men (s).

The provisions in 52 Hen. 3, c. 28, 3 Edw. 1, c. 21, and 21 Edw. 1, c. 5, as to the custody of the temporalities of bishoprics

(o) Wats. c. 40, p. 421.

(p) 2 Inst. p. 141; *Rennell v. Bp. of Lincoln*, 7 B. & C. p. 113; 3 Bing. p. 223.

(q) Wats. c. 40, p. 421.

(r) *Covert's case*, Cro. Eliz. p. 754.

(s) 2 Inst. p. 15.

during the vacancy, and the remedies of their successors for damage to the temporalities during vacancy have been repealed (apparently as obsolete) by 26 & 27 Vict. c. 125, and 42 & 43 Vict. c. 59 (*t*).

When a new bishop is made, he may not *de jure* before his consecration claim the temporalities of his bishopric, although *ex gratia* the king by his letters-patent may grant them unto him after his confirmation, and before his consecration, and the grant then made is good; but after that he is consecrated, invested, and installed, he may sue for his temporalities out of the king's hands by a writ directed to the escheator. Yet upon such writ, the temporalities are not *de jure* to be delivered until the metropolitan has certified the time of his consecration, although the freehold of the temporalities be in him by the consecration (*u*).

When the custody of the temporalities ceases.

The following are the stamp duties imposed by the present act (54 & 55 Vict. c. 39) upon the various steps in the creation of a bishop:—

“Grant or letters patent under the Great Seal of the United Kingdom of Great Britain and Ireland: Stamp duties

“(2) Of a congé d'élire to any dean and chapter for the election of an archbishop or bishop.	}	£	s.	d.
“(3) Of the royal assent to, or signification of, the election made by any dean and chapter, or of the nomination and presentation by her Majesty in default of such election of any person to be an archbishop or bishop				
“(4) Of or for the restitution of the temporalities to any archbishop or bishop				
			30	0 0

It should be here mentioned that, according to the general rule of law as to the personalty of a corporation sole, a bond given to an archbishop or bishop falls to and should be sued upon by his executor, not his successor (*x*). But the ornaments of a bishop's chapel go to his successor. This was declared in the Bishop of Carlisle's case, 21 Edw. III. (*y*).

Personalty of former bishop.

SECT. 9.—Archbishops' Jurisdiction over their Provincial Bishops.

The archbishop has two concurrent jurisdictions, one as ordinary or bishop within his own diocese, the other as superintendent throughout his whole province of all ecclesiastical matters, to correct and supply the defects of other bishops.

General power of the archbishop.

(*t*) See Gibs. p. 655; 2 Inst. p. 15; 2 Inst. pp. 151, 152.

(*u*) Wats. c. 40, p. 423.

(*y*) *Howley v. Knight*, 14 Q. B.

p. 240. See also *Re Thakeham Sequestration Monies*, 12 L. R., Eq.

p. 494.

(*y*) Gibs. p. 171.

Archbishop's
visitation of
bishops.

If the archbishop visit his inferior bishop, and inhibit him during the visitation; if the bishop has a title to collate to a benefice within his diocese by reason of lapse, yet the bishop cannot institute his clerk; but the clerk ought to be presented to the archbishop, and the archbishop is to institute him, by reason that during the inhibition the bishop's power of jurisdiction is suspended (z).

Hooker says, "Archbishops were chief among bishops, yet archbishops had not over bishops that full authority which every bishop had over his own particular clergy: bishops were not subject to their archbishops as an ordinary, by whom at all times they were to be judged, according to the manner of inferior pastors, within the compass of each diocese. A bishop might suspend, excommunicate, depose such as were of his own clergy without any other bishop's assistance; not so an archbishop the bishops that were in his own province, above whom divers prerogatives were given to him, howbeit no such authority and power as alone to be judge over them. For as a bishop could not be ordained, so neither might he be judged by any one only bishop, albeit that bishop were his metropolitan" (a).

Our own Ecclesiastical History furnishes several instances of metropolitical visitations in the times which immediately followed the Reformation. Archbishop Cranmer was the first to exercise this "*jus metropolitatum*" (b). In 1560, Archbishop Parker visited the dioceses within the province of Canterbury. In 1576, Archbishop Grindal, and in 1583 Archbishop Whitgift, held similar visitations (c).

Whether he
can proceed to
deprivation.

Dr. Godolphin says, that the consecration of a bishop is *character indelebilis*: insomuch that although it should so happen, that for some just cause he should be deprived or removed from the see, or suspended *ab officio et beneficio*, both from his spiritual jurisdiction as to the exercise and execution thereof, and also from the temporalities and profits of the bishopric; yet he still retains the title of a bishop, for that it is supposed the order itself cannot absolutely be taken from him (d).

But as to deprivation Dr. Ayliffe says, that in England, an archbishop may deprive a bishop, if his crime deserves so severe a punishment; and that it is said in the canon law, that a bishop who is unprofitable to his diocese ought to be deprived, and no coadjutor assigned him, nor shall he be restored again thereunto (e).

And Dr. Gibson delivers it absolutely, that the archbishop has a right to deprive a suffragan bishop; and for the same

(z) God. p. 19.

(a) Eccles. Pol., bk. vii. c. 16, § 7.

(b) Strype, Life of Cranmer, vol. i. p. 259.

(c) See Strype, Life of Parker, vol. i. p. 144; Life of Grindal, p. 38; Life of Whitgift, vol. i. pp. 244, 410.

(d) God. p. 49.

(e) Ayl. Par. p. 124.

refers to the case of *Lucy v. Dr. Watson, Bishop of St. David's*, which was A.D. 1695, in the reign of William III.

In that case, one Lucy promoted a suit *ex officio* before Archbishop Tennison, in a court held at Lambeth, before the archbishop himself in person (who called to his assistance six other bishops) for simony and other offences. The citation in this case was issued on August 23, 1695 (*f*). The bishop appeared to it on October 24, and claimed privilege as a peer, raising no other ground of objection. Thereupon Lucy, on March 7, 1696, petitioned the House of Lords that the bishop might not be allowed to avail himself of his claim of privilege. This petition was rejected, on the bishop's undertaking to waive his privilege.

Bishop of
St. David's
case.

The suit then proceeded. On February 20, 1699, the bishop interposed a protest on the ground that the offences charged were mostly of temporal cognizance. This protest was overruled by the archbishop. Thereupon the bishop appealed to the delegates, and pending his appeal moved for a prohibition on two grounds (1) that the case should have been tried in the Arches Court; (2) that the case was one of temporal cognizance. The Court of Queen's Bench refused a prohibition on the first ground. As to the second ground a prohibition was granted as to some of the articles of charge, but not as to the others (*g*). And Holt, Chief Justice, said: The admitting of that point of the jurisdiction to be disputed, would be to admit the disputing of fundamentals, which the counsel of the other side attempt to subvert, not duly considering the respect due to the Primate and Metropolitan of England; for the Archbishop of Canterbury has without doubt provincial jurisdiction over all his suffragan bishops, which he may exercise in what place of the province it shall please him; and it is not material to be in the Arches, no more than in any other place; for the Arches is only a peculiar, consisting of divers parishes in London, exempt from the Bishop of London, where the Archbishop of Canterbury exerciseth his metropolitanical jurisdiction, but he is not confined to exercise it there: And the citation is here to appear before the archbishop himself, or his vicar general, who is an officer of whom the law takes notice; for the vicar general in the provinces is of the same nature as the chancellor in every particular diocese; and the dean of the Arches is the vicar general of the archbishop in all the province.

A prohibition being thus denied, except in part, the archbishop went on, and many scandalous things were proved against the Bishop of St. David's, to the satisfaction of the court. But when they were going to give judgment, the bishop, though he had waived the privilege of his peerage, and had gone on sub-

(*f*) The dates and items in this statement are taken from the papers prepared in the argument of the *Bp. of Lincoln's case*, and printed

as Appendix 26 to Roscoe, Report of *Bp. of Lincoln's case*.

(*g*) 1 Ld. Raym. p. 447; 12 Mod. p. 237; Carth. p. 484.

mitting to the authority of his judge, yet then resumed his privilege. No regard, however, was had to this plea, since it was not offered in the first instance: and the archbishop, with the concurrence of the majority of his assessors, pronounced a sentence of deprivation on August 3rd, 1699.

Upon this, the Bishop of St. David's appealed to the delegates: and perceiving that they were of opinion to affirm the sentence, he first of all claimed to resume his privilege. This, on December 6th, 1699, the House of Lords, after hearing counsel on both sides and the attorney-general, in a very general and discursive argument, refused by what would be called in modern times a strict party vote, the bishop being a Jacobite (*h*).

Secondly, the bishop moved again for another prohibition to be granted to the commissioners delegate, to stay their proceedings in the appeal from the sentence of the archbishop; upon a suggestion—1. That by the canon law, the archbishop alone could not deprive a bishop. 2. That the delegates refused to admit his allegations.

As to the first, Holt, Chief Justice, and the rest held, that an archbishop hath power over his suffragan bishops, and may deprive them; that though there may be a co-ordination amongst the bishops *jure divino*, yet there is a subordination *jure ecclesiastico qua humano*; not of necessity from the nature of their offices, but for convenience: and for what other purpose have archbishops been instituted by ecclesiastical constitutions? The power of an archbishop was very great here in England anciently; and he had the same jurisdiction of supremacy, as the patriarchs of Constantinople and other places. The pope used to call him *alterius orbis papam*, and he exercised the same jurisdiction with him. Theodore, who was archbishop not long after Austin, deprived Winifred, Bishop of York, for the said see was not then metropolitical, but subject to the Archbishop of Canterbury; and yet at the same time there was a council held, and Beda commends Theodore for it. But afterwards, in the time of Henry I. and King Stephen, the pope usurped the authority of the archbishops; in exchange for which, they became *legati nati* of the pope. And that is the reason why this practice cannot be found to have been put in use for so long a time. But at this day, by the act of Henry VIII. this jurisdiction is restored. It was always admitted that the archbishop had metropolitical jurisdiction, and the bishops swear canonical obedience to him; and where there is a visitatorial power, there is no reason to question the power of deprivation; for the same superiority, which gives him power to pass ecclesiastical censures upon the bishops, will give him power to deprive, it being only a different degree of punishment for a different degree of offence. And to question the authority of

(*h*) 14 State Trials, p. 447, where privation pronounced by the archbishop.

the archbishop is to question the very foundations of the government. But Holt, Chief Justice, said, that though he was fully satisfied that the archbishop hath such jurisdiction; yet he would not make that the ground of denying a prohibition in this case: The matter of the suggestion is, that the archbishop is restrained by the canon law, from proceeding without the assistance of others: whether he be so or not, is matter proper for the conusance of the delegates upon the appeal, but is no ground to prohibit them from proceeding; and it is without precedent, to grant a prohibition to the ecclesiastical court, because they proceed there contrary to the canons.

Then it was moved, that the court would grant a mandamus to the delegates to admit the bishop's allegations, and it was compared to the cases where they grant mandamuses to compel the granting of probates of wills, or letters of administration. But by Holt, Chief Justice: The King's Bench cannot grant a mandamus to them to compel them to proceed according to their law: indeed mandamuses are grantable to compel probate of wills, because it concerns temporal right; and to compel the granting of letters of administration, because the statute directs to whom they shall be granted. But in the present case a mandamus was not granted.

Upon the whole a prohibition was denied by the court; and they ordered that the suggestion be entered on record, that the court might enter their reasons of denial (*i*).

On February 16th, 1700, the appeal accordingly came before the delegates for hearing. The minute of that day is: "The counsel for the bishop of St. David's insisting that the archbishop had not jurisdiction in this cause, the court having considered the arguments on both sides and debated the matter, is unanimously of opinion that the archbishop had and this court hath jurisdiction in this cause, and doth order the counsel to proceed in the same." And on February 22nd the delegates confirmed the sentence.

After the denial of the prohibition, the Bishop of St. David's petitioned the Lord Chancellor Somers to have a writ of error upon this denial of the prohibition. Who having some doubt whether it would lie or not, referred it to the then Attorney-General, who certified his opinion to be that a writ of error would lie in this case. Upon which, the suggestion was entered upon record, and the denial of the prohibition, and the writ of error was granted, and the whole record brought by the Chief Justice into parliament. And afterwards, upon hearing of his opinion, the lords of parliament were of opinion that a writ of error would not lie in this case. This was on March 2nd, 1700.

And Lord Raymond says, that Lord Chief Justice Holt told him, if the lords had been of opinion that the prohibition ought to have been granted, yet he never would have granted it (*k*).

(*i*) 1 Ld. Raym. p. 539.

(*k*) 1 Ld. Raym. p. 545.

The bishop was afterwards excommunicated for non-payment of costs, and in Michaelmas Term in the 1 Anne was brought into the Court of King's Bench upon an habeas corpus directed to the sheriff of Middlesex, in order to be discharged. To which writ the sheriff made a long return, in which the *significavit* and *excommunicato capiendo* were shown at large, by which it appeared that the defendant was in custody of the sheriff, being arrested upon an *excommunicato capiendo*, being excommunicated for non-payment of costs, in which he was condemned by the commissioners delegate. And the return of the habeas corpus being filed (though the defendant was informed that the *significavit* was bad, and that by exception taken to it he might be discharged), his counsel offered a plea ingrossed, and signed by counsel, that he long before, and at the time of the prosecution was, and now is, Bishop of St. David's: that he was summoned to parliament in the seventh year of King William, and sat there as bishop, as appeared by the record; and so concluded in abatement because a *capias* doth not lie against a peer. And the intent of this plea was, to have the judgment of the King's Bench upon it, and upon the same judgment to bring a writ of error in parliament, where he hoped to have judgment in his favour as to the right of the bishopric, of which he was deprived by the archbishop. And therefore his counsel insisted that their plea should be received, and that they were ready to try it with the Attorney-General, whether the defendant was bishop or not; and that if he is bishop, as they say he is, then a *capias* will not lie against him, because he is a peer of parliament. But the court refused at first to receive the plea. 1. Because the defendant is not in custody of the marshal, and therefore he cannot plead so as he has here. 2. He hath not made any conclusion to his plea, and therefore the court doth not know what judgment he desires. 3. All the court held that bishops are subject to be excommunicated, and if an *excommunicato capiendo* should not lie against them, there would be a judgment without a power of executing it, which is absurd.

But afterwards the defendant amended his plea, and pleaded as in custody of the sheriff of Middlesex. And upon the importunity of the defendant's counsel, the plea was received, and a day given to the queen's attorney-general to reply to it, or demur, as he should judge proper. But the attorney-general not being ready for the queen, prayed another day. And afterwards he came and declared to the court that he would not intermeddle in the matter. Upon which the court said, that since it appeared to them that the *significavit* was ill, because it did not appear that these costs were adjudged in a cause of ecclesiastical cognizance, they quashed the writ of *excommunicato capiendo*, and discharged the defendant, and refused to take any notice of the plea (1).

(1) 2 Id. Raym. p. 817.

Dr. Warner says that Dr. Watson having been promoted by King James II., "the party of that unhappy monarch, though ashamed of Watson as a corrupt and vicious prelate, yet was resolved to support him with great zeal. The archbishop's jurisdiction was therefore excepted against in the House of Lords by some of his friends, under a pretence that he could not judge a bishop, but in a synod of the bishops of the province, according to the rules of primitive times. In answer to this, it was shown, that from the ninth century downward, both popes and kings had concurred to bring this power singly into the hands of the metropolitans; that it was the constant practice in England before the Reformation; and by the provisional clause in the act of 25 Hen. 8, c. 19, empowering a new body of ecclesiastical laws to be drawn, all former laws and customs were to continue in force till that new code was framed, which confirmed the power the metropolitan was then possessed of. Nor could the archbishop erect a new court or proceed in the trial of a bishop in any other way than in that which was warranted by law or precedent. To this no answer was made or could be made, but yet the business was kept up by the bishop's friends, and at last dropped with an intimation, that it was hoped his majesty would not fill the see till the house was better satisfied of the archbishop's authority" (*m*).

After the sentence of deprivation had been confirmed, the crown as having the custody of the temporalities of the see during vacancy claimed the bishop's palace and lands, and the attorney-general exhibited an information of intrusion against the bishop in the Court of Exchequer. To this the bishop appeared and pleaded (as the rules of pleading then allowed one plea only) that being a peer he could not be deprived by the archbishop. The Court of Exchequer gave judgment against this plea. The bishop appealed to the Exchequer Chamber, which court also decided against him on November 24th, 1704. He then appealed to the House of Lords: but, as he stated, by a mistake of his attorney, was one day late in assigning his errors. This act of laches was deemed fatal, and though he petitioned for indulgence, his petition was refused, again by a strict party vote, it is said, and his appeal was dismissed January 25th, 1705 (*n*). After this the bishopric was filled up.

In 1822 (*o*), it became necessary to take measures for the deprivation of an Irish bishop for the commission of a misdemeanor. He was deprived by sentence of the Court of Armagh, and the crown appointed his successor. The opinions of the law officers of the crown were taken by the Government.

I have been enabled to give them at length (*p*). They are

(*m*) 2 Warn. p. 656.

(*n*) Roscoe, Report of *Bp. of Lincoln's case*, Appendixes 26 & 27, and authorities cited at p. 9, note (*i*).

(*o*) See Annual Register for 1822; Chronicle, pp. 252—266.

(*p*) They were read by Sir Robert Phillimore as counsel in the *Bp. of*

Bishop of Clogher's case.

very important: it will be seen that they were subscribed by Lords Gifford and Lyndhurst, then attorney and solicitor-general, as well as by the Queen's advocate.

"Doctors' Commons, 26th July, 1822.

Law officers' opinion as to deprivation of bishop.

"Sir—We have had the honour to receive your letter dated the 24th instant, transmitting to us copies of informations taken before Mr. Dyer, a magistrate of the county of Middlesex, touching a misdemeanor of a very heinous nature, committed in that county by the Lord Bishop of Clogher, in Ireland, which is calculated to bring great scandal on the Established Church; and desiring that we would take this matter into our earliest consideration, and report to you for the information of his Majesty, whether any and what proceedings can be taken for the deposition of the bishop, and for his deprivation of the see of Clogher; and whether such proceedings can be commenced forthwith or must be postponed until after the bishop shall have forfeited the recognizances he has given for his appearance at the next Middlesex Sessions, or after his outlawry and conviction.

"And you further desire that we would consider whether in case of the bishop's tendering his resignation there will be any objection to accepting it, and in what manner the see can be vacated by resignation.

"In obedience to your commands, we beg leave to state for the information of his Majesty, that we have perused the informations in this case, and have considered the questions which involve points of considerable nicety and importance, proposed for our opinion, and beg leave to report that we think proceedings may forthwith be instituted before the Metropolitan against the Lord Bishop of Clogher for his deposition and deprivation, which terms, notwithstanding some confusion in the books upon the subject, will be found upon investigation to mean the same thing. 'Depositum dicitur qui privatus est Beneficio et Officio;' Lyndwood—Const. Otho (q).

"We apprehend the proper course of proceeding will be to exhibit articles against the bishop, as in the case of the Bishop of St. David's, in the reign of King William the Third. Whatever doubts or difficulties might under other circumstances have been suggested by reason of the temporal nature of the offence imputed to the bishop, we are of opinion that no objection of this kind can be raised in the present case, the offence not having been committed within the jurisdiction of the temporal courts of Ireland.

"We think, in the event of the bishop tendering his resignation, there can be no legal objection to accepting it; and that

Natal's case before the Privy Council (*Re Bp. of Natal*, 3 Moore P. C. C. N. S. p. 115), which was, however,

decided upon another and wholly different ground.

(q) Otho, Athon, p. 45.

the resignation should be to the Metropolitan, and accepted by him with the King's consent.

"We have the honour to be, Sir,

"Your obedient humble Servants,

(Signed) "CHRISTR. ROBINSON.

"R. GIFFORD.

"J. S. COPLEY.

"Mr. Secretary Peel,"
&c. &c. &c.

"Case for avoiding the patent of the Bishop of Clogher—

"Recites, Stat. 2nd Eliz. c. 4 (Irish), ss. 1, 2, 3 & 4, and then sets forth a letter from the lord lieutenant of Ireland to Mr. Secretary Peel transmitting the sentence of deprivation, &c., (vide *Document Book*, p. 121), and the same having been transmitted to the solicitor of the treasury, with directions to submit them to his Majesty's advocate, attorney and solicitor-general, and their opinion is requested—

Law officers' opinion as to avoiding the bishop's patent.

"As to the steps which should be taken to avoid the patent of the Bishop of Clogher.

"We do not think that any step is necessary to be taken to avoid the patent, but that the see now being vacant by the sentence of deprivation pronounced against the late bishop, such vacancy will authorize his Majesty to appoint a successor by letters patent, in which the vacancy by the sentence of deprivation should be stated as the foundation of the new appointment, in the same manner as the vacancy by translation in the former instance, as appears by the documents in the case.

(Signed)

"CHRISTR. ROBINSON.

"ROBT. GIFFORD.

"J. S. COPLEY.

"Doctors' Commons,

"15th November, 1822."

On the other hand Cheney, Bishop of Gloucester in 1571 (*r*), and Goodman, Bishop of Gloucester in 1640 (*s*), were proceeded against in convocation, and Wood, Bishop of Lichfield, was brought for dilapidations before the Court of Arches (*t*). While in 1672 Hacket, Bishop of Down and Connor, was tried and deprived, not by his archbishop, but by three bishops sitting under a royal commission (*u*).

Bishops tried by other jurisdictions.

The law is thus left in a state of uncertainty, which, it is submitted, is not removed by the recent case of *Read v. The Bishop of Lincoln*. In that case the archbishop at first declined to claim jurisdiction by issuing a citation to the bishop. But the Privy Council on an appeal ex parte, very hastily and somewhat briefly declared that the archbishop had jurisdiction to issue a citation, leaving it, however, undeclared before what court the archbishop

Bishop of Lincoln's case.

(*r*) Strype, *Life of Parker*, vol. ii. p. 52; vol. iii. p. 182.

(*s*) Gibson, *Synodus Anglicana*, p. 191.

(*t*) Cardwell, *Doc. Ann.*, vol. ii. p. 352.

(*u*) Mant, *Hist. of the Church of Ireland*, vol. ii. p. 41.

should cite the bishop (*x*). The archbishop having then cited the bishop to appear before himself and sitting with certain of the bishops of his province chosen by himself as his assessors, according to the supposed precedent of the bishop of St. David's case, the Bishop of Lincoln appeared under protest to the jurisdiction, alleging that there was no court known to the law before which he was cited, and that he was only liable to be tried, and ought to be tried, by the archbishop and bishops of the province assembled in synod or convocation. This protest was argued on both sides for several days. Ultimately the archbishop, declining to consult his assessors, though they had sat throughout the argument, gave a judgment declaring that the archbishop always had had in the province of Canterbury jurisdiction over his suffragans, which jurisdiction was exercised "in many forms," sometimes in synod, sometimes as in the case before him with assessors, that this jurisdiction was well established, and the case must proceed (*y*).

The Bishop of Lincoln so far submitted as to appear absolutely after explaining his reasons. But his counsel renewed the objection at every stage of the proceedings: and as in the end the archbishop decided much of the case in the bishop's favour, and gave no sentence against him as to the rest, there was no reason for further contest on the part of the bishop (*z*).

The prosecutors appealed from this decision, so far as it was unfavourable to them, to the Privy Council. The bishop did not appear or take part in the proceedings, and the Privy Council decided against the prosecutors and confirmed such parts of the sentence as had been appealed against (*a*).

In province of
York.

Unless the contention of Mark, Bishop of Carlisle, that he was to be tried by his Ordinary instead of by a temporal court (*b*) be a precedent, there is no example of the Archbishop of York exercising or being reputed to have disciplinary jurisdiction over his suffragans.

(*x*) 13 P. D. p. 221.

(*y*) 14 P. D. p. 88.

(*z*) Roscoe's Report of *Bp. of Lincoln's case*.

(*a*) *Read v. Bp. of Lincoln*, 1891, P., p. 9.

(*b*) *Vide supra*, p. 61.

CHAPTER II.

BISHOPS WITHOUT SEES.

WE have considered the legal status of bishops with regular sees; it now remains to consider the status of bishops without them, viz:—

Classes of
bishops with-
out sees.

1. *Chorepiscopi*.
2. *Episcopi regionarii, or gentium*.
3. *Episcopi titulares, or in partibus*.
4. *Episcopi suffraganei*.
5. *Coadjutores*.
6. *Resignation of bishops*.

Chorepiscopi, local bishops in the ancient church, were persons delegated by the bishop of the city to exercise episcopal jurisdiction within certain districts.

Origin of
chorepiscopi.

This institution took place when the dioceses were enlarged by the conversion of Pagans in the country at a great distance from the chief city in which the bishop dwelt; the origin of the name being not "*ex choro sacerdotum*," but τῆς χώρας ἐπισκόποι, or country bishops (*a*). There are three opinions about the nature of this order: 1, that they were mere presbyters; 2, that some were presbyters and some bishops; 3, that they were all bishops; and this last opinion is countenanced by the approbation of Bingham and Müller. It seems that they ordained the inferior clergy, but not presbyters or deacons without special licence from the bishop (*b*); and though their power varied at different times and in different places, yet they appear to have had power to confirm, to grant letters dimissory to the clergy, and to sit and vote in councils. The increasing authority, ecclesiastical and political, of the bishops of the towns tended to circumscribe and ultimately to destroy the function of the country episcopate. The Council of Laodicea, A.D. 343, dealt a heavy blow to their power, which became almost entirely extinct towards the close of the ninth century (*c*).

They dwindled down into arch-presbyters and rural deans without episcopal authority. But in England learned anti-

(*a*) Sometimes called ἐπισκόποι τῶν ἀγρῶν, sometimes *Vicarii*.

(*b*) See Council of Antioch, A.D. 341, c. x., which forbids them to ordain priest or deacon "δίχα τοῦ ἐν τῇ πόλει ἐπισκόπου ἢ ὑποκείμεναι αὐτὸς τε καὶ ἡ χώρα." Beveridge, *Pand.* vol. i:

p. 439.

(*c*) Cf. Burnet, *Hist. Reform.* vol. ii. p. 158; Bingham *Orig. Eccl.* vol. i. p. 56; and Thomass. vol. i. p. 215; Hinschius, *Kirchenrecht*, bk. ii., § 85.

quaries (*d*) hold that they existed till they were extinguished by Lanfranc; and that their place was not supplied in A.D. 1325 by bishops *in partibus*, then first instituted, who will be considered presently.

Episcopi
regionarii.

The Chorepiscopi were a class of bishops distinct from the class called *episcopi regionarii* or *gentium* (*e*). This episcopate, without any definite or fixed see or diocese, appeared in the kingdom of the Franks during the eighth and ninth centuries, and came into it chiefly from England and Scotland. They acted as missionary bishops in subordination and rendering assistance to the diocesan bishop in the exercise of his functions, much in the same way that retired colonial bishops now assist the bishops in Great Britain and Ireland.

Episcopi
titulares or
in partibus.

Another class of episcopate was formed by titular bishops, or bishops *in partibus* (*f*). These had originally presided over dioceses from which they had been expelled by the Pagans, but retained the title of their sees.

In subsequent times bishops were consecrated for the general convenience of the church, with a title derived from some place in heathendom. The object of their institution was to assist the church at home, and in course of time they became identical in practice though not in theory with the class of suffragan bishops (*suffraganei*—*auxiliares*).

Perhaps a writer of the fourteenth century gave a true account, when he said:—"Freres ben made bishops to go and preche and convert heathen men, and leave this ghostly office and be suffragans in England."

Suffragan
bishops.

Bishops suffragan (*g*) (from *suffragari*, to help) were con-

(*d*) Much learning upon this subject is to be found in a small volume, by the Rev. John Lewis, printed by J. Nicholls, London, 1785, and entitled "Some Account of Suffragan Bishops in England," which includes a letter by Mr. Lewis, written in 1738, and an Essay; a letter from Mr. Pegge, written in 1784, to Dr. Ducarel; and a list of the suffragan bishops in England by the Rev. H. Wharton, printed from MS. in Lambeth Library, 1769, comprised in *Bibliotheca Topographica Britannica*, vol. vi.

(*e*) See Hinschius, *Kirchenrecht*, bk. ii., § 85, *Die Wanderbischöfe*, and the case of Richard Martyn; Strype, *Life of Cranmer*, vol. i. p. 52; Wharton, *Anglia Sacra*, vol. i. p. 790. "Ricardus Martyn Episcopus ejusdem (i. e. Sidoniæ) ante Thomam Wells suffraganeus Præfectus erat cœnobii Minoritarum in urbe Cantuariâ. Testa-

mento anno 1498 condito plurima cœnobio suo legavit. Nullum titulum obtinuit Episcopus Ecclesie Catholice in Testamento suo appellatus."

(*f*) See list of English bishops *in partibus*. Pegge's letter, pp. 25, 26. The titles are all taken from places in foreign parts.

(*g*) See a list of suffragans in England, by Wharton, transcribed from MS., Lambeth Library, 1769, and printed at the close of the work referred to in the former note. They are called "Chorepiscopi." In the Sarum Manual, in the charge given "to Godfaders and Godmoders," they are charged "to lerne the child or see that he lerned the Pater noster, &c., and in all goodly haste to be conformed of my lord of the diocese or his depute." Lind. p. 11, note (*g*). "Suffraganeis, sic dictis quia archiepiscopo suffragari et assistere tenentur. Vocati sunt in partem sollicitudinis archiepiscop-

separated to supply the place of the bishop of the see when absent on the business of embassies or on weighty affairs of the church or crown, chiefly in conferring of orders and in confirming; but not as to grave matters of jurisdiction. Neither the name nor the office of suffragan is to be found in the history of the English Church before the Conquest. The first trace of one seems to be in A.D. 1240. But from the end of the thirteenth century to the time of Henry the Eighth there seems to have been a pretty regular succession of suffragans in most dioceses. By courtesy they were commonly designated "lords."

It is indeed a vulgar error that the title of lord is only given to bishops with seats in parliament. The Bishop of Sodor and Man always had the title. It is probably only a translation of "Dominus," and just as applicable to the bishop of a church not established as of one established by temporal law.

It would seem that on the demise of or translation of the diocesan, the commission given by him to the suffragan was void, and renewed or not according to the pleasure of his successor (*h*).

In a less proper sense, all the provincial bishops, with respect to the archbishop, are sometimes called his suffragans (*i*).

By 26 Hen. 8, c. 14, s. 1, "Forasmuch as no provision hitherto hath been made for suffragans, which have been accustomed to be had within this realm, for the more speedy administration of the sacraments and other good wholesome and devout things and laudable ceremonies, to the increase of God's honour, and for the commodity of good and devout people," it is enacted that "the towns of Thetford, Ipswich, Colchester, Dover, Guilford, Southampton, Taunton, Shaftsbury, Molton, Marlborough, Bedford, Leicester, Gloucester, Shrewsbury, Bristow, Penreth, Bridgewater, Nottingham, Grantham, Hull, Huntingdon, Cambridge, and the towns of Pereth (*h*), and Berwick, St. Germans in Cornwall, and the Isle of Wight, shall be taken and accepted for sees of bishops suffragans."

Bristol (Bristow) and Gloucester were soon after made full sees. No suffragan was appointed for Rochester, Chester, Chichester, Hereford, or Lichfield, as the dioceses then were.

Forasmuch as no Provision hitherto hath been made.]—That is, by act of parliament; as had been for archbishops and bishops by 25 Hen. 8, c. 20.

copi, non in plenitudinem potestatis." Ibid. p. 18. "Mandantes nostris cœpiscopis et suffraganeis universis ut, &c." Ibid. p. 11, note (*f*). "Cœpiscopis suffraganeisque, licet enim ordo episcoporum distinguatur in patriarchas, archiepiscopos, metropolitanos et episcopos—omnes tamen hi uno eodemque vocabulo episcopi nominantur." See too Gloss. "In ipsis," p. 13.

(*h*) Lewis' Account, p. 13; Strype, Life of Whitgift; New Commission to Rogers Suffragan of Dover, vol. i. p. 263; vol. iii. p. 69.

(*i*) Lyndwood, p. 317, note (*e*). Tanquam verè ponitur et non similitudinariè.

(*k*) In Pembrokeshire—Diocese of St. Davids, Archdeaconry of Cardigan, Deanery of Emllyn. Lewis' Account, p. 9, note 1.

Title of lord.

Sees of suffragan bishops.

The Towns of Thetford, &c.].—The suffragans have their sees in towns; and not in cities, as the bishops in England have.

Nomination
of a suffragan
bishop.

It is by the act further provided that, every archbishop, and bishop . . . “being disposed to have any suffragan,” shall name “two honest and discreet spiritual persons, being learned and of good conversation,” and present them to the king, “by writing under their seals, making humble request to his majesty, to give to one such of the said two persons as shall please his majesty, such title, name, style, and dignity of bishop of such of the sees above specified, as the king’s highness shall think most convenient for the same.” And the king, upon such presentation, shall have power to give him the style, title, and name of a bishop of such of the sees aforesaid, as he shall think convenient; so it be within the province whereof the bishop that doth name him is. And he shall be called bishop suffragan of the same see (*l*).

Of such of the Sees aforesaid as he shall think convenient.].—As there are not sees for suffragans appointed in every diocese, so neither is the king obliged to give the suffragan a title within the diocese of the bishop who does recommend him; but he may (without regard to the diocese wherein they are to officiate) give them any of the titles mentioned in this act; nevertheless, generally, the titles have been given within the dioceses they were to assist in (*m*).

Mandate for
consecration.

And after such title, style, and name so given, the king shall present him by his letters-patent under the great seal, to the archbishop of the province, requiring him to consecrate the said person, “and to give him all such creations, benedictions and ceremonies, as to the degree and office of a bishop suffragan shall be requisite” (*n*).

To the Archbishop of the Province.].—By the canon law, the consecration was to be by the bishop, assisted by two neighbouring bishops (*o*).

Consecration
of a suffragan
bishop.

“The bishop that shall nominate the suffragan to the king’s highness, or the suffragan himself that shall be nominated, shall provide two bishops or suffragans to consecrate him with the archbishop, and shall bear their reasonable costs” (*p*).

And the archbishop, having no lawful impediment, shall consecrate such suffragan, within three months next after the letters-patent shall come to his hands (*q*).

His power.

And the person so consecrated shall “have such capacity, power and authority, honour, preeminence, and reputation in as large and ample manner in and concerning the execution of such commission as by any of the said archbishops or bishops within their diocese shall be given to the said suffragans, as to suffragans of this realm heretofore has been used and accustomed” (*r*).

Heretofore hath been used and accustomed.].—There is no doubt, Bishop Gibson says, but the persons received to be suffragan

(*l*) 26 Hen. 8, c. 14, s. 1.

(*m*) Gibs. p. 134.

(*n*) 26 Hen. 8, c. 14, s. 1.

(*o*) Gibs. p. 135.

(*p*) 26 Hen. 8, c. 14, s. 5.

(*q*) Ibid. s. 3.

(*r*) Ibid. s. 2.

bishops in England, before the making of this act, were confined to the exercise of such powers only, as they had commission for from time to time; supposing the proper bishop not to be wholly disabled by infirmities of body or mind; and therefore the limiting them to such commissions here was only a continuance of them in their former state (*s*).

And their office usually was, to confirm, ordain, dedicate churches, and the like; that is, to execute those things which pertain to the episcopal office: as to jurisdiction and temporalities, these (in case of the infirmities of a bishop in body or mind) were put under the management of a coadjutor, constituted by the archbishop (*t*).

It is by the act further provided, that no such suffragan "shall take or perceive any manner of profit of the places and sees whereof they shall be named, nor use, have, or execute any jurisdiction or episcopal power or authority within their said sees, nor within any diocese or place . . . but only such profits, jurisdiction, power, and authority as shall be licensed and limited to them to take, do, and execute by any archbishop or bishop . . . within their diocese to whom they shall be suffragans, by commission under their seals; and that every archbishop and bishop . . . for their own peculiar diocese, may and shall give such commission or commissions to every such bishop suffragan . . . as hath been accustomed . . . or else such commission as shall by them be thought requisite, reasonable, and convenient; and that no such suffragan shall use any jurisdiction, ordinary or episcopal power, otherwise, nor longer time than shall be limited by such commission:" on pain of a præmunire.

And the residence of him that shall be suffragan over the diocese where he shall have commission, shall serve him for his residence as sufficiently as if he were resident upon any other his benefice (*u*).

And such suffragan exercising the said office by such commission as aforesaid, for the better maintenance of his dignity, may have two benefices with cure (*x*). This act was repealed by Queen Mary and revived by Elizabeth.

By the canons of 1603 (35, 60, 135) suffragans are presumed to be in existence and to aid the bishops in conferring orders and visitation of their dioceses.

In King Charles the Second's declaration touching ecclesiastical affairs, immediately before his restoration, one head is as follows: Because the dioceses, especially some of them, are thought to be of too large extent; we will appoint such number of suffragan bishops in every diocese as shall be sufficient for the due performance of their work (*y*).

In the year 1870 suffragan bishops were consecrated under the authority of the statute for Nottingham and Dover. More recently several others have been consecrated.

(*s*) Gibs. p. 135.

(*t*) Gibs. p. 134.

(*u*) 26 Hen. 8, c. 14, s. 6.

(*x*) Ibid. s. 7.

(*y*) Gibs. p. 134.

His residence.

May hold
two livings.

Recognized
by canons.

By Charles II.

Recent action
under the
statute.

New suffra-
gan sees.

By 51 & 52 Vict. c. 56 (amending the act of Henry VIII.) s. 2, "such other towns as" the queen "may by order in council direct shall be taken and accepted for sees of bishops suffragans, as if they had been included in that act."

And by s. 3, the queen may under her sign manual "substitute for the see of any bishop suffragan nominated before the passing of the act any town included in any such order in council."

Coadjutors.

It was an ancient custom in the church, that when a bishop grew very aged, or otherwise unfit to discharge the episcopal office, a coadjutor was taken by him or given to him; at first, in order to succeed him, but in later times only to be an assistant during life; in matters chiefly of jurisdiction, as in collating to benefices, granting institutions, dispensations, and the like; and in this case it was not necessary that such coadjutor should be episcopally ordained. But the duties merely episcopal, as the conferring orders, confirmation, and consecrations of divers kinds, were in such case committed to the suffragan bishop, as has been said. And this was the practice here in England especially: The two ends, of orders, and of jurisdiction voluntary, in case of the inability of a bishop, were answered by two several persons; the first under the name of suffragan, and the second under the name of coadjutor (*z*).

In the canon law, direction is given for a coadjutor also to an archdeacon; and in our ecclesiastical records, there are many instances, modern as well as ancient, of coadjutors given to other dignitaries, and also to incumbents of benefices (*a*).

Innocent III. to the Archbishop of Arles: "You have stated to me that the Bishop of Orange having laboured under a severe and incurable disease for nearly four years, so that he cannot by any means discharge his pastoral duty, the prince of the country, and the inhabitants of the city, have unremittingly requested you as their metropolitan to take their case into consideration; but since you cannot, and indeed ought not to compel him to yield up his charge, and, instead of adding to his affliction, ought to pity his misfortunes; for he was a good man, and wholesomely governed the church committed to him; we, willing to provide as well for the bishop as the church, decree, that you shall associate to him as coadjutor a provident and honest man, who may act with advantage both for the bishop and the people" (*b*).

In all cases, indeed, of any habitual distemper of the mind, whereby the incumbent is rendered incapable of the administration of his cure, such as frenzy, lunacy, and the like, the laws of the church have provided coadjutors. Of these there are many instances in the ecclesiastical records, both before and since the Reformation; and we find them given generally to parochial ministers (as most numerous), but sometimes also to deans, arch-

(*z*) Gibs. p. 137.

(*a*) Ibid.

(*b*) X. iii. 6, 5.

deacons, prebendaries, and the like; and no doubt they may be given in such circumstances, at the discretion of the ordinary, to any ecclesiastical person having ecclesiastical cure and revenue (*c*). In the decretal of Gregory, a coadjutor is directed to be given to a rector afflicted with leprosy; also to an archdeacon, who from a paralytic complaint had lost the use of speech (*d*).

The powers conveyed at first, in general terms, the office of a coadjutor, and then, in particular, the looking after the cure, and receiving of the profits, and the discharging of the burthens; with an obligation to be accountable to the ordinary when called upon. But the article of looking after the cure seems to be a late clause; there being no more in the ancient appointments of this kind, even since the Reformation, than the administration of the revenues; which therefore exactly answers to the powers which were given to the coadjutors of bishops, who were appointed only to take care of the temporalities. And as there the spiritual part was committed by the metropolitan to a bishop suffragan, so here it was committed by the diocesan to a curate duly licensed. Not but the office of coadjutor to an incumbent was always committed to a clergyman; who therefore, if not engaged in another cure, might be content to take upon him the spiritual part also, and have it accordingly committed to him by the bishop: but this was no part of the office of a coadjutor, as such; which, in the case of presbyters as well as bishops, did anciently relate to the temporalities only (*e*).

In the reign of Elizabeth, the Court of Wards had committed the person and revenues of a lunatic incumbent to a layman who was his near relation. Against this Archbishop Whitgift objected, as an encroachment upon the ecclesiastical jurisdiction; and proved the charge by divers testimonies out of the records of Canterbury and London; whereby it appeared, that this had always been a care belonging to the governors of the church. And the person to whom the custody had been committed being cited to answer the allegations of the archbishop, and alleging nothing to the contrary, the court thereupon made the following declaration:—"This court hath not any power or jurisdiction, to intermeddle or commit the spiritual or ecclesiastical livings or possessions of any spiritual person that is lunatic or *non compos mentis*; but the same resteth in the ecclesiastical magistrates, to appoint and dispose, as formerly hath been accustomed. But for the moveable goods of the said — and his temporal possessions, the court will further consider thereof, and give such order as therein shall appertain." In pursuance of which declaration, the archbishop committed the administration of the spiritual revenues to a clergyman, under the style of coadjutor; and did afterwards, by a separate instrument, commit the custody of the lunatic to the person who had been appointed for the whole care by the Court of Wards (*f*).

(*c*) Gibs. p. 901.

(*d*) X. iii, 6, 6.

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(*e*) Gibs. pp. 901, 902.

(*f*) Gibs. p. 902.

As in the time of Archbishop Abbot we find the commission of a coadjutor explained and enforced by special rules and orders to be observed between the minister and his coadjutor, in point of profits, &c. ; so in the time of Archbishop Sancroft, we first find a bond also given by the coadjutor for a faithful account to be made to the ordinary or other spiritual judge to be appointed by him (*g*).

The learned Bingham thus describes coadjutors: "These were such bishops as were ordained to assist some other bishops in case of infirmity or old age, and were to be subordinate to them as long as they lived, and succeed them when they died" (*h*).

The Bishops
Resignation
Act, 1869.

In 1869 the statute 32 & 33 Vict. c. 111, "The Bishops Resignation Act, 1869," was passed, "to provide for the relief of archbishops and bishops who by reason of age or any mental or bodily infirmity may be permanently incapacitated from the due performance of their episcopal duties."

As to resig-
nation of
bishops.

By sect. 2 of this act, "On a representation being made to her Majesty, in manner hereinafter mentioned, that any archbishop or bishop in England is desirous of resigning his archbishopric or bishopric by reason that he is incapacitated by age or some mental or permanent physical infirmity from the due performance of his duties, as archbishop or bishop, it shall be lawful for her Majesty, if satisfied of such incapacity, and that such archbishop or bishop has canonically resigned, by order in council to declare such archbishopric or bishopric to be vacant, and thereupon such vacancy may be filled up in the same manner and with the same incidents in all respects as if such archbishop or bishop were dead, with the exceptions following; that is to say,

- (1.) There shall be paid, by the year, to the retiring archbishop or bishop, out of the revenue of the archbishopric or bishopric, and as a first charge thereon in the hands of the successor, such one of the two sums hereinafter mentioned as may be the greater, that is to say, one third part of the income enjoyed by the retiring archbishop or bishop before his retirement, or two thousand pounds; such yearly sums to accrue due from day to day, but to be payable half-yearly: Provided that if in the case of the retirement of any bishop appointed before the year one thousand eight hundred and thirty-two such retiring allowance shall exceed the sum of two thousand pounds, the excess shall be paid by the Ecclesiastical Commissioners for England out of their common fund:

- (2.) Her Majesty may, upon special grounds, by the order in council declaring the archbishopric or bishopric to be vacant, or by any subsequent order in council, assign to the retiring archbishop or bishop, for his residence

(*g*) Gibs. p. 902.

(*h*) See Bingham, Orig. Eccl.
vol. i. p. 177, for cases of coadjutors.

See also the case of Dr. Mountain,
Bishop of Montreal.

during his life, any episcopal residence hitherto occupied by him.

- (3.) With the exception of the necessary expenses of his election and consecration, an archbishop or bishop succeeding to a retiring archbishop or bishop in pursuance of this section, shall not be required to pay the fees and charges usually payable on accession to an archbishopric or bishopric until the death of the retiring archbishop or bishop.

For the purposes of this section a representation shall be made to her Majesty, in the case of a bishop desirous of resigning, by the archbishop of the province at the instance of the bishop, and in the case of an archbishop by such archbishop himself."

Sect. 3. "If it appears to any archbishop on credible evidence that any bishop within his province is incapacitated by reason of permanent mental infirmity from the due performance of his episcopal duties, he shall call to his aid two bishops of his province, and such archbishop and bishops shall inquire into the existence of such incapacity, and if satisfied thereof shall certify under their hands and seals the fact to one of her Majesty's principal secretaries of state, together with the evidence on which their certificate is founded."

Proceedings to prove the incapacity of a bishop.

Sect. 4. "Upon the receipt of such certificate it shall be lawful for her Majesty to grant to the dean and chapter of the diocese a licence to proceed to the election of a bishop coadjutor, accompanied by a letter missive from her Majesty containing the name of the person whom her Majesty may desire to be appointed bishop coadjutor of the diocese to which the bishop certified to be incapacitated belongs, and the dean and chapter shall thereupon proceed in reference to the election of the person named as bishop coadjutor in the same manner in all respects as if a licence had been granted to them to proceed to the election of a bishop, accompanied by the usual letter missive, and the person named as bishop coadjutor, when so elected, shall be confirmed and consecrated a bishop in like manner as if the bishopric of the incapacitated bishop were vacant."

Appointment of bishop coadjutor.

Sect. 5. "The following enactments shall be made with respect to the relative positions of the incapacitated bishop, in this act referred to as the bishop and his bishop coadjutor:

Relative positions of bishop and bishop coadjutor.

- (1.) The bishop shall retain his rank, style, and privilege:
- (2.) Subject to the annual payment by this act directed to be made to the bishop coadjutor, the bishop shall retain all the temporalities of his see, except the patronage:
- (3.) The bishop coadjutor shall not as such either be installed or sue the temporalities of the see out of the queen's hands, or acquire any title to sit in the House of Lords. He shall be styled the bishop coadjutor of the diocese to which he is attached, and may subscribe himself by his usual signature with the addition of bishop, but not by the name of the diocese:

- (4.) The bishop coadjutor shall not as such be required to pay any fees except the necessary expenses of his election and consecration :
- (5.) Immediately upon the consecration of a bishop coadjutor the spiritualities of the see and the patronage of the bishop shall pass to and vest in the bishop coadjutor, in the same manner and to the same extent as if he were the sole bishop, and such bishop shall for all purposes and in all respects, except as by this act otherwise provided, be deemed to be sole bishop of the diocese in which he is appointed bishop coadjutor :
- (6.) There shall be paid to the bishop coadjutor out of the episcopal income of the bishop the sum of two thousand pounds by the year :
- (7.) The said sum of two thousand pounds shall be deemed to be a first charge on the income of the bishop, and to accrue due from day to day, but to be payable half-yearly :
- (8.) Upon the death of the bishop the bishop coadjutor shall succeed to his bishopric with the same ceremonies, upon the same payments, and in the same manner in all respects, except consecration, as if her Majesty had granted to the dean and chapter of the diocese a licence to proceed to the election of a bishop, and such licence had been accompanied by a letter missive of her Majesty naming the bishop coadjutor as the person whom the dean and chapter were required to elect and choose :
- (9.) When a bishop coadjutor has been appointed, and the bishop dies, no vacancy shall be created in the spiritualities of the bishopric to which the bishop coadjutor succeeds, but such spiritualities shall, in the case of the bishop coadjutor succeeding to the deceased bishop, remain vested in the bishop coadjutor."

Conduct of
inquiry.

Sect. 6. "The persons authorized under this act to make an inquiry into the incapacity of a bishop shall give notice to the registrar of the diocese of a time and place at which the inquiry will be made, and the registrar or any person authorized by or on behalf of the incapacitated bishop may attend such inquiry, and produce such evidence on behalf of the bishop as he thinks fit, and cross-examine the witnesses adduced to prove his incapacity and generally conduct the case on behalf of the bishop. The persons conducting the inquiry, or any of them, may examine witnesses on oath or not, in writing or orally, as they think expedient, and any person when examined by such persons who wilfully makes a false statement, whether on oath or not, shall be guilty of a misdemeanor. Any person refusing to give evidence when required, after a tender of his reasonable expenses, may be certified by any person conducting such inquiry to have so refused to any judge of one of her Majesty's superior courts

of law or equity, and such judge may deal with such person in the same way as if he had refused to give evidence in a proceeding instituted in the court of which he is judge."

Sect. 7. "If any bishop has been found by due process of law to be a lunatic or of unsound mind, the archbishop may dispense with an inquiry and certify to her Majesty under his hand and seal the incapacity of such bishop, and such certificate shall for the purposes of this Act have the same effect in all respects as if it were the certificate of the archbishop and two bishops made in pursuance of this act."

Proof of incapacity by bishop.

Sect. 8. "The expenses of any inquiry under this act into the incapacity of a bishop shall be certified under the hands of any two persons authorized to conduct the inquiry, and when so certified shall be defrayed out of the revenues of the bishopric."

Expenses of inquiry.

Sect. 9. "The annual charge payable in respect of first fruits and tenths shall, in the case of the appointment of any bishop coadjutor, be paid by such coadjutor and the bishop in proportion to the income received by them respectively in pursuance of this act."

Apportionment of first fruits and tenths.

Sect. 10. "If any bishop coadjutor dies or resigns, the same consequences shall ensue, and the same powers in relation to a bishop coadjutor shall accrue to her Majesty as upon the receipt of a certificate under this act that the bishop of the diocese is incapacitated by mental infirmity from the due performance of his episcopal duties."

Death or resignation of bishop coadjutor.

Sect. 11. "This act shall apply to the bishopric of Sodor and Man in the same manner in all respects as if it were a bishopric in England, with the following exceptions:

Application of act to the bishopric of Sodor and Man.

- (1.) If the Bishop of Sodor and Man resign, his retiring pension shall be one thousand pounds a year:
- (2.) If a coadjutor be appointed to the Bishop of Sodor and Man the yearly sum payable to such bishop coadjutor shall be one thousand pounds a year:
- (3.) The Bishop of Sodor and Man shall not be translated to any diocese of which a bishop coadjutor has been appointed."

Sect. 12. "A bishop coadjutor may be appointed in the case of an archbishop being incapacitated by reason of permanent mental infirmity from the due performance of his duties, in the same manner in all respects as if such archbishop were a bishop and his archbishopric a bishopric, and all the provisions of this act shall apply accordingly with the following additions and exceptions:

Application of the act to archbishops.

- (1.) That where the incapacity of an archbishop is in question there shall in the inquiry be substituted for the archbishop such bishop of his province as her Majesty may by sign manual determine, on its being certified to her Majesty by any two bishops of the province that the archbishop is incapacitated by permanent mental infirmity from the due performance of his duties, and

the nominee of her Majesty shall in all respects for the purposes of this act exercise the powers of an archbishop :

- (2.) That in the case of the Archbishop of York the bishop coadjutor shall be entitled to a salary of three thousand pounds a year, and in the case of the Archbishop of Canterbury to a salary of four thousand pounds a year :
- (3.) That the archiepiscopal jurisdiction capable of being exercised by the archbishop shall be exercised by the bishop of the province who is senior in rank."

Provision as
to translation
of bishops.

Sect. 13. "Notwithstanding the appointment of a bishop coadjutor, her Majesty may in the case of the archbishopric of Canterbury, the archbishopric of York, or any of the bishoprics of London, Durham, or Winchester, on the death of the archbishop or bishop, exercise the same right of translation as if no bishop coadjutor had been appointed, so that such right be so exercised as to leave an archbishopric or bishopric vacant for the bishop coadjutor, and in the event of any translation or translations taking place the bishop coadjutor shall be entitled to succeed to any archbishopric or bishopric thereby left vacant in the same manner in all respects as if he were a bishop and not a bishop coadjutor, and had been translated to such vacant archbishopric or bishopric."

Definitions.

Sect. 14. "In this act:—

'Temporalities' shall include all real and personal property held by any archbishop or bishop as such, and all fees and emoluments receivable by him by virtue of his office :

'Spiritualities' shall include all episcopal and other jurisdiction of whatever description exercisable by an archbishop or bishop :

'Patronage' shall include all advowsons, rights of presentation to benefices, and any ecclesiastical or cathedral preferment or dignity, and all other appointments to office exercisable by an archbishop or bishop by reason of his office" (i).

Act now
perpetual.

The act was originally to be in force for two years: it was then continued for three years more; and in 1875 was made perpetual by 38 & 39 Vict. c. 19.

(i) This act repeals a previous statute on the same subject, 6 & 7 Vict. c. 22. A special act was passed in 1856 to provide for the

resignation of the then Bishops of London and Durham, 19 & 20 Vict. c. 115.

CHAPTER III.

PRIESTS AND DEACONS—ORDINATION.

- SECT. 1.—*Priests and Deacons.*
 2.—*Ordination generally.*
 3.—*The Form of Ordaining Priests and Deacons.*
 4.—*The Time and Place for Ordinations.*
 5.—*Qualifications by the general Law.*
 6.—*Qualifications under the later English Law.*
 7.—*Oaths and Subscriptions previous to Ordination.*
 8.—*Form and Manner of Ordaining Deacons.*
 9.—*Form and Manner of Ordaining Priests.*
 10.—*Fees for Ordination.*
 11.—*Simoniacal Promotions to Orders.*
 12.—*General Office of Deacons.*
 13.—*General Office of Priests.*
 14.—*Exhibiting Letters of Orders.*
 15.—*Archbishop Wake's Directions in relation to Orders.*
 16.—*Foreign Ordination.*

SECT. 1.—*Priests and Deacons.*

[THE bishop is the centre and head of his diocese. The unity of the Church requires that this should be so. According to the theory of ecclesiastical law, no considerable action with respect to the service of God should be taken without his actual or implied consent. (Beneath him, but around him, and next to him, come the *presbyterium*, composed of priests and deacons. Without their counsel, he formerly undertook no grave or important matter. At his death, they administered the affairs of the diocese until the appointment of his successor.) The minor officers of the Western Church, sub-deacons, acolytes, exorcists, readers, ostiaries, formed part of the episcopal staff of the *clerus*, were educated with the higher officers, were promoted to their status, lived under a rule of discipline or *canon*, and were *canonici*—i.e., *sub manu episcopi*, or *sub ordine canonico*; while the monks, who were rarely in holy orders before the tenth century, by the help of privileges obtained from the pope, acted without, and often contrary to, the authority of the bishop, and lived in their monasteries *sub ordine regulari*. Who they are.

SECT. 2.—*Ordination generally.*

The bishop in relation to his priests and deacons.

Having observed that the central point of the religious community is the bishop, I proceed to notice his assistants in the administration of his diocese—*i. e.*, the priests and deacons (*a*). For their discipline, good conduct and teaching he is responsible. He must, therefore, have reasonable security for their religious, moral and intellectual fitness for the discharge of the portion of duty which he confides to them, and he must also have the requisite means of punishing and removing those who are faithless to their trust.

Bishop's power in examining candidates.

The law of the Church has conferred on the bishop the means of executing his office in these respects, by examination of the candidates for holy orders, and the consequent power of rejecting those who are unfit, and by the visitation and punishment, after inquiry in due course of law, of heretical and immoral clerks.

Education of candidates.

In the early days of the Church, the *clerus* were educated in schools connected with the episcopate of each diocese, and there instructed both in sacred and secular literature (*sacris in literis, disciplinis humanioris literature*).

And in later times the Third and Fourth Lateran Councils provided for the connection of grammatical instruction with the church of the diocese, and of theological instruction with the church of the metropolis.

Afterwards the schools of the monasteries and the superior instruction of universities supplied the education of the clergy. The turbulent and undisciplined life of the students at the universities was, however, supposed to be out of harmony with the proper training of ecclesiastics, and the Council of Trent endeavoured to revive the schools of cathedrals (*b*). In the Greek Church, the clerical education was chiefly in the hands of the monks. In the English Church, the constitution of every cathedral made some provision for ecclesiastical education, efforts to revive which have been made in our own time by the institution of diocesan training colleges. Till lately, however, the English universities were most intimately connected with the teaching and *status* of the Church, and the honours and emoluments both of the university and of the colleges which belonged to it were confined to members of the Church, who had subscribed the formularies and passed the examination which the Church prescribed.

The rite of ordination.

The rite through which the bishop as a successor of the apostles transmits to his clerical assistants a portion of his authority is ordination (*ordinatio*). Through ordination, as by a solemn consecration, the ordained person receives the privileges and powers necessary for the execution of sacerdotal functions in the church. Ordination is not merely the formal

(*a*) Walter, Lehrbuch, Buch 5; and authorities there cited.

(*b*) Conc. Trid., Sess. xxiii. c. 18.

nomination of a person to a particular place or office, though in early days it was usually connected with such a nomination. Ordination has been always holden by the Church to be indelible and incapable of repetition. ⁵

The canonists distinguish the office-bearers in the Church into those who compose the *sacerdotium* and those who compose the *ministerium*. The former were empowered to administer the sacraments; the latter were employed in the discharge of subsidiary ministerial functions.

Classes of office-bearers in the Church.

The *ordines* of bishops, priests, and deacons are called *ordines hierarchici*. In earlier times they were called *ordines sacri*. After the twelfth century the sub-deacon was ranked amongst the *ordines sacri*; and according to the Tridentine law of the Roman church the *ordines sacri* or *maiores* include bishops, priests, deacons, and sub-deacons; the *ordines minores* or *non sacri* include the acolyte, exorcist, lector, and ostiary (c).

The *sacerdotium* is composed of the order of priests and deacons in our church. The word priest is nearly the same in all Christian languages, evidently enough taken from the Greek *πρεσβυτέρος*.

In like manner, the word deacon, with little variation, runs through all the same languages, deduced from the Greek *διάκονος*.

According to the traditions of the Latin and Greek churches ordination to the *sacerdotium* was considered a sacrament. According to our Art. 25, orders are not to be counted for a sacrament of the Gospel; as not having the "like nature of sacraments with baptism and the Lord's Supper, for that they have not any visible sign or ceremony ordained of God."

Orders not a sacrament of the gospel.

Our Prayer-book says: "It is evident unto all men diligently reading Holy Scripture and ancient authors, that from the apostles' time there have been these orders of ministers in Christ's Church; bishops, priests, and deacons. Which officers were evermore had in such reverend estimation, that no man might presume to execute any of them, except he were first called, tried, examined, and known to have such qualities as are requisite for the same; and also by public prayer, with imposition of hands, were approved and admitted thereunto by lawful authority" (d).

Antiquity of priests and deacons in the church.

Bishops, Priests, and Deacons.—The other orders of the Church of Rome which composed the *ministerium* were, as it has been said, five: viz., subdeacons, acolyths, exorcists, readers, and ostiaries. 1. The subdeacon is he who delivers the vessels to the deacon, and assists him in the administration of the sacrament of the Lord's Supper. 2. The acolyth, is he who bears the lighted candle whilst the Gospel is in reading, or whilst the priest consecrates the host. 3. The exorcist, is he who abjures evil spirits in the name of Almighty God to go out of persons troubled

Inferior orders.

(c) Conc. Trid., Sess. xxiii. c. 2.

(d) Preface to the Forms of Consecration and Ordination.

therewith. 4. The reader, is he who reads in the Church of God, being also ordained to this, that he may preach the word of God to the people. 5. The ostiary, is he who keeps the doors of the church and tolls the bell (*d*).

Necessity of
ordination.

That no Man might presume to execute any of them.]—And to this purpose, the rule laid down in the canon law is, that if any person not being ordained, shall baptize, or exercise any divine office, he shall for his rashness be cast out of the church, and never be ordained (*e*).

Except he were first called.]—Accordingly in the several offices, the person to be admitted is first examined by the archbishop or bishop, whether he thinks or is persuaded that he is truly called thereunto, according to the will of Christ, and the due order of this realm.

Tried, examined, and known.]—By the office of ordination, when the archdeacon or his deputy presents unto the bishop the persons to be ordained, the bishop says, “Take heed that the persons whom you present unto us, be apt and meet for their learning and godly conversation to exercise their ministry duly, to the honour of God and the edifying of his Church.” To which he answers, “I have inquired of them, and also examined them, and think them so to be.”

Imposition of Hands.]—This was always a distinction between the three superior, and the five forementioned inferior orders; that the first were given by imposition of hands, the second not (*f*).

The learned Wheatley (*g*) observes on this subject:—“And to what has been said, we might for farther proof add the joint testimony of all Christians for near fifteen hundred years together; and challenge our adversaries to produce one instance of a valid ordination by presbyters in all that time. It seems therefore very strange that if presbyters ever had the power of ordination, they should so tamely give up their right, without any complaint, or so much as having anything upon record to witness their original authority to after ages. In short, we have as much reason to believe that the power of ordination is appropriated to those we now call bishops, as we have to believe the necessary continuance of any one positive ordinance in the Gospel.” “And now (to sum up all that has been said in a few words) a commission to ordain was given to none but the apostles and their successors; and to extend it to any inferior order, is without warrant in Scripture or antiquity. For every commission is naturally exclusive of all persons except those to whom it was given. So that, since it does not appear, that the commission to ordain, which the apostles received from our Saviour, was ever granted to any but such as must be acknowledged to be of

(*d*) Gibs. p. 99.

(*e*) Gibs. p. 138.

(*f*) Gibs. p. 99.

(*g*) Wheatley on the Book of
Common Prayer, Chap. II., § 3.

a superior order to that of presbyters, which superior order is the same with that of those we now call bishops, therefore it follows, that no others have any pretence thereunto; and consequently none but such as are ordained by bishops can have any title to minister in the Christian Church."

SECT. 3.—*The Form of Ordaining Priests and Deacons.*

In the liturgy established in the second year of King Edward VI., there was also a form of consecrating and ordaining of bishops, priests and deacons; not much differing from the present form.

Form established in the 2 Edw. 6.

Afterwards, by 3 & 4 Edw. 6, c. 10, s. 1, it was enacted that all books heretofore used for service of the church, other than such as shall be set forth by the king's majesty, shall be clearly abolished.

All other forms abolished.

And by 5 & 6 Edw. 6, c. 1, the king, with the assent of the lords and commons in parliament, hath annexed the Book of Common Prayer to this present statute; "adding also a form and manner of making and consecrating archbishops, bishops, priests, and deacons, to be of like force, authority and value as the same like foresaid book entitled the Book of Common Prayer was before" (*h*).

Form established by 5 & 6 Edw. 6, c. 1.

And by Art. 36 of the Thirty-nine Articles, "The Book of Consecration of Archbishops and Bishops, and ordering of Priests and Deacons, lately set forth in the time of Edward VI., and confirmed at the same time by authority of parliament, doth contain all things necessary to such consecration and ordering; neither hath it any thing, that of itself is superstitious and ungodly. And therefore, whosoever are consecrated or ordered according to the rites of that book, since the second year of the forenamed King Edward unto this time, or hereafter shall be consecrated or ordered according to the same rites; we decree all such to be rightly, orderly, and lawfully consecrated and ordered."

By the thirty-nine articles.

And by Can. 8 of 1603, "Whosoever shall hereafter affirm or teach, that the form and manner of making or consecrating bishops, priests and deacons, containeth any thing in it that is repugnant to the word of God; or that they who are made bishops, priests or deacons, in that form, are not lawfully made, nor ought to be accounted, either by themselves or others, to be truly either bishops, priests, or deacons, until they have some other calling to those divine offices; let him be excommunicated *ipso facto*, not to be restored, until he repent, and publicly revoke such his wicked errors."

By canon.

And by 14 Car. II. c. 4, s. 1, it is enacted as follows: "All ministers in every place of public worship shall be bound to use

By 14 Car. II. c. 4.

(*h*) 5 & 6 Edw. 6, c. 1, s. 4; 8 Eliz. c. 1.

the morning and evening prayer, administration of the sacraments, and all other the public and common prayer, in such order and form as is mentioned in the book annexed to this present act, and intituled, 'The Book of Common Prayer and administration of the Sacraments, and other Rites and Ceremonies of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches; and the Form or Manner of making, ordaining and consecrating of Bishops, Priests and Deacons.'"

And by sect. 16, all subscriptions to be made to the Thirty-nine Articles shall be construed to extend (touching the said thirty-sixth article above recited) to the book containing the form and manner of making, ordaining and consecrating of bishops, priests, and deacons in this act mentioned, as the same did heretofore extend unto the book set forth in the time of King Edward VI.



SECT. 4.—*The Time and Place for Ordination.*

Time.

By Can. 31 of 1603, "Forasmuch as the ancient fathers of the church, led by example of the apostles, appointed prayers and fasts to be used at the solemn ordering of ministers; and to that purpose allotted certain times, in which only sacred orders might be given or conferred; we, following their holy and religious example, do constitute and decree, that no deacons or ministers be made and ordained, but only upon Sundays immediately following *jejunia quatuor temporum*, commonly called ember weeks, appointed in ancient time for prayer and fasting, (purposely for this cause at their first institution,) and so continued at this day in the Church of England. And that this be done in the cathedral, or parish church where the bishop resideth" (i).

And by the preface to the forms of consecration and ordination it is prescribed, that the bishop may at the times appointed in the canon, or else upon urgent occasion on some other Sunday or holyday in the face of the church, admit deacons and priests.

But this might not be done, at other times than is directed by the canon, at the sole discretion of the bishop, but he was to have the archbishop's dispensation or licence, as the practice was: and this was once considered a special prerogative of the see of Rome. But as the rubric made in the time of King Edward the Sixth, and continued in the last revisal of the Common Prayer, seems to leave it to the judgment of the bishop, without any direction to have recourse to the archbishop, it may be a question whether such dispensation be now necessary (k).

(i) This canon is continued on p. 104, *infra*. (k) Gibs. p. 139.

The Canon as above quoted shows that the bishop's jurisdiction ^{Place.} as to conferring of orders is not confined to one certain place, but he may ordain at the parish church where he shall reside; and the Irish bishops have sometimes ordained in England; but, regularly, leave ought to be obtained of the bishop within whose diocese the ordination is performed (*l*).

And this is agreeable to the rule of the ancient canon law; which directs, that a bishop shall not ordain within the diocese of another, without the licence of such other bishop (*m*).

SECT. 5.—*Qualifications by the general Law.*

{ There are only two classes of persons absolutely incapable of ordination (*n*); namely, unbaptized persons and women. Ordination of such persons is wholly inoperative. The former, because baptism is the condition of belonging to the church at all (*o*). The latter, because by nature, Holy Scripture and catholic usage they are disqualified (*p*). }

Qualifica-
tions by the
general law

Though an absolute incapacity be confined to these two classes, yet the canon law, having regard to the great importance of the subject, has been careful to prescribe the qualifications, and to set forth the disqualifications of candidates for holy orders. The law enjoins that the candidate be of sufficient age and learning, and of good reputation. That he be not afflicted with any corporal infirmity which would impede the exercise of his spiritual functions, and tend to repel and alienate the laity. That he be born in lawful wedlock. That he be not engaged in secular occupations inconsistent with devotion to the spiritual calling. Disqualifications of this kind constitute what, since the twelfth century, have been canonically termed *irregularitates*, and may upon sufficient grounds be removed by the dispensation of the bishop. There are *irregularitates ex defectu* and *ex delicto*.

Looking to the provincial constitutions of this country, we find that by a constitution of Otho it is thus enjoined: "Seeing it is dangerous to ordain persons unworthy, void of understanding, illegitimate, irregular and illiterate, we do decree that,

(*l*) Johns. p. 34.

(*m*) Gibs. p. 139; VI. iii. 4, 37.

(*n*) VI. i. 11, De filiis presbyterorum et aliis illegitimè natis. X. i. 18, De Servis non ordinandis. 19, De obligatis ad ratocinia non ordinandis. 20, De corpore vitiatas non ordinandis. 21, De bigamis non ordinandis. VI. i. 12, De bigamis. X. iii. 43, De presbytero non baptizato. X. i. 11; VI. i. 9, De temporibus ordi-

nationum. X. i. 12, De scrutinio in ordine faciendo. 13, De ordinatis ab episcopo qui renuntiavit. 22, De clericis peregrinis. X. v. 29, De clerico per saltum promot. 30, De eo qui furtive ordinem suscepit.

(*o*) Baptismum, sacramentorum fundamentum et januam reliquorum.—VI. iv. 3. De cogn. spir.

(*p*) 1 Cor. xiv. 34; 1 Tim. ii. 12—14.

before the conferring of orders by the bishop, strict search and inquiry be made of all these things" (*q*). And by a constitution of Archbishop Reynolds, "No simoniae, homicide, person excommunicate, usurer, sacrilegious person, incendiary, or falsifier, nor any other having canonical impediment, shall be admitted into holy orders" (*r*).

Canonical Impediment.]—As suppose, of bigamy; or any other which proceeds rather from defect than crime (*s*).

And by several constitutions of Edmund, archbishop, the following impediments and offences are declared to be causes of suspension from orders received, and consequently so far forth are objections likewise, if known beforehand, against being ordained at all; viz.,

They who are born of not lawful matrimony, and have been ordained without dispensation, shall be suspended from the execution of their office, till they obtain a dispensation:

They who have taken holy orders, in the conscience of any mortal sin, or for temporal gain only, shall not execute their office, till they shall have been expiated from the like sin by the sacrament of penance.

Again; all who appear to have contracted irregularity in the taking of orders, or before or after, unless dispensed withal by those who have power to dispense with the same, shall be suspended from the execution of their office, until they shall have lawful dispensations: By irregulars as to the premisses, we understand homicides, advocates in causes of blood, simonists, makers of simoniacal contracts; and who, being infected with the contagion, have knowingly taken orders from heretics, schismatics, or persons excommunicated by name:

Also bigamists, husbands of lewd women, violators of virgins consecrated to God, persons excommunicate, and persons having taken orders surreptitiously, sorcerers, burners of churches, and if there be any other of the like kind (*t*).

And he who did examine the parties, was to inquire into all these particulars.

But this is not now required; but all the same so far as they concern a man's capacity, learning, piety and virtue are included in the following directions in the Preface to the form of ordaining deacons, which is in some degree an enlargement of the foregoing restrictions: viz.,

"The bishop knowing, either by himself, or by sufficient testimony, any person to be a man of virtuous conversation, and without crime; and after examination and trial, finding him learned in the Latin tongue, and sufficiently instructed in Holy Scripture, may admit him a deacon."

And by Can. 34 of 1603: "No bishop shall henceforth admit any person into sacred orders, which is not of his own diocese,

(*q*) Otho, Athon. 16.
(*r*) Lind. p. 33.

(*s*) Ibid.
(*t*) Lind. p. 26.

except he be either of one of the universities of this realm, or except he shall bring letters dimissory (so termed) from the bishop of whose diocese he is; and desiring to be a deacon is three and twenty years old; and to be a priest four and twenty years complete; and hath taken some degree of school in either of the two universities; or at the least, except he be able to yield an account of his faith in Latin according to the Articles of Religion approved in the synod of the bishops and clergy of this realm one thousand five hundred sixty and two, and to confirm the same by sufficient testimonies out of the Holy Scriptures; and except, moreover, he shall then exhibit letters testimonial of his good life and conversation, under the seal of some college of Cambridge or Oxford, where before he remained, or of three or four grave ministers, together with the subscription and testimony of other credible persons, who have known his life and behaviour by the space of three years next before."

SECT. 6.—*Qualifications under the later English Law.*

By Can. 34 of 1603, as already stated, no bishop shall admit any person into sacred orders except he, "desiring to be a deacon, is three and twenty years old, and to be a priest four and twenty years complete." Under later English law. Age.

And by the preface to the form of ordination: "None shall be admitted a deacon except he be twenty-three years of age, unless he have a faculty, and every man which is to be admitted a priest shall be full four and twenty years old."

Unless he have a Faculty.]—So that a faculty or dispensation is allowed for persons of extraordinary abilities to be admitted deacons sooner (*u*).

Which faculty (as it seems) must be obtained from the Archbishop of Canterbury.

And by 13 Eliz. c. 12, s. 4, "None shall be made minister, being under the age of four and twenty years."

And in this case there is no dispensation (*x*).

Here it may be proper to observe, once for all, the equivocal signification of the word minister, both in our statutes, canons, and rubrics in the Book of Common Prayer. Oftentimes it is made to express the person officiating in general, whether priest or deacon; at other times it denotes the priest alone, as contradistinguished from the deacon, as particularly here in this statute, and in Can. 31 aforegoing (*y*). And in such cases, the determination thereof can only be ascertained from the connection and circumstances. Meaning of word minister.

In the case of *Roberts v. Pain* (*z*), in the time of James the *Roberts v. Pain.*

(*u*) Gibs. p. 145.

(*x*) Gibs. p. 146.

(*y*) Vide supra, p. 92.

(*z*) 3 Mod. p. 67.

First, a person being presented to the parish church of Christ Church, in Bristol, was libelled against, because he was not twenty-three years of age when made deacon, nor twenty-four when made priest. A prohibition was prayed upon this suggestion that if the matter was true, a temporal loss, to wit deprivation, would follow; and that therefore it was triable in the temporal court: But it was denied, because so it is also in the case of drunkenness and other vices, which are usually punished in the ecclesiastical courts, though temporal loss may ensue.

Effect of
ordination
once con-
ferred.

In a case where it was supposed that ordination had been illegally conferred upon a candidate who had not attained the age of twenty-four, Sir W. Scott (Lord Stowell) was consulted as to whether evidence of this fact would be admitted in order to show that an act done by him as priest was null and void.

Opinion.

"It appears to me that the ordination would be conclusive as to all legal qualifications of the party, and that evidence could not be received to show that it had been illegally conferred and was invalid.

"Nov. 1794.

WM. SCOTT."

Act of 44 Geo.
3, c. 43.

But the effect of this opinion must now be qualified by 44 Geo. 3, c. 43, s. 1, which enacts that "no person shall be admitted a deacon before he shall have attained the age of three and twenty years complete, and that no person shall be admitted a priest before he shall have attained the age of four and twenty years complete: and in case any person shall, from and after the passing of this act, be admitted a deacon before he shall have attained the age of three and twenty years complete, or be admitted a priest before he shall have attained the age of four and twenty years complete, that then and in every such case the admission of every such person as deacon or priest respectively shall be merely void in law, as if such admission had not been made, and the person so admitted shall be wholly incapable of having, holding or enjoying, or being admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, in virtue of such his admission as deacon or priest respectively, or of any qualification derived or supposed to be derived therefrom: Provided always that no title to confer or present by lapse shall accrue by any avoidance or deprivation, *ipso facto*, by virtue of this statute, but after six months' notice of such avoidance or deprivation given by the ordinary to the patron."

But it is also provided that "nothing herein contained shall extend, or be construed to extend, to take away any right of granting faculties heretofore lawfully exercised, and which now may be lawfully exercised by the Archbishop of Canterbury."

Title to orders.

(Holy orders being indelible, the Church is careful not to allow idle persons or those wholly unprovided with the means of supporting themselves to be ordained.) She requires what is technically called a title. The terms *titulus beneficii*, *titulus patrimonii*, *titulus mensæ sive pensionis*, occur in the canon law. For monastic

orders, indeed, the *titulus paupertatis* sufficed. But generally speaking the bishop who ordained without a title was bound to support the clerk, and the producer of a false title was liable to suspension (a).

Can. 33 of 1603. "It hath been long since provided by many decrees of the ancient fathers, that none should be admitted either deacon or priest, who had not first some certain place where he might use his function: According to which examples we do ordain, that henceforth no person shall be admitted into sacred orders, except he shall at that time exhibit to the bishop, of whom he desireth imposition of hands, a presentation of himself to some ecclesiastical preferment then void in the diocese; or shall bring to the said bishop a true and undoubted certificate, that either he is provided of some church within the said diocese where he may attend the cure of souls, or some minister's place vacant either in the cathedral church of that diocese, or in some other collegiate church therein also situate, where he may execute his ministry; or that he is a fellow, or in right as a fellow, or to be a conduct or chaplain in some college in Cambridge or Oxford; or except he be a master of arts of five years' standing, that liveth of his own charge in either of the universities; or except by the bishop himself that doth ordain him minister, he be shortly after to be admitted either to some benefice or curateship then void. And if any bishop shall admit any person into the ministry that hath none of these titles as is aforesaid, then he shall keep and maintain him with all things necessary, till he do prefer him to some ecclesiastical living: And if the said bishop shall refuse so to do, he shall be suspended by the archbishop, being assisted with another bishop, from giving of orders by the space of a year" (b).

No Person, &c.—By this branch of the canon, which is negative and exclusive, one sort of title that was heretofore very common, is in great measure taken away, viz., the title of his patrimony, which we meet with very frequently among the acts of ordination in our ecclesiastical records; and not only so, but the title of a pension or allowance in money which is frequently specified; and sometimes the title of a particular person (of known abilities and there named) without any such specification of an annual sum. And at such titles, after the estate, sum or the like, is often added in the acts of ordination (especially when it was small) that the party therewith acknowledged himself content, which declaration, so made and entered, was understood to be a discharge of the bishop ordaining from any obligation to provide for him (c).

In the Cathedral Church.—This is only an affirmance of what was the law of the church before; the title of vicar choral being

(a) X. iii. 5, cc. 2, 4, 16, 37, De c. 2.
præbendis: eod. in VI. iii. 4. 1. (b) God. p. 13.
Dist. lxx. Conc. Trident. Sess. 21, (c) Gibs. p. 140.

frequently entered as a canonical title in the acts of ordination (*f*).

Or that he is a Fellow.]—This also, as to fellows of colleges, appears to have been all along the law of the Church of England, by the frequent entries of that title, as received and admitted in the acts of ordination (*g*).

Chaplain in some College.]—This seems to be a title founded on this canon, from the silence of the ancient books relating thereto (*g*).

Master of Arts of Five Years' standing.]—This also seems to be a new title established by the canon (*g*).

Shall keep and maintain him.]—This was enjoined by a canon of the third Council of Lateran (*h*); which canon was taken into the body of laws made in a council held at London, in the year 1200. And in the time of Archbishop Winchelsey, there is in the register an order from the archbishop to one of his comprovincial bishops, to provide one with a benefice whom he had ordained without title; and a citation of the executors of a bishop deceased, to oblige them to provide for one, whom the bishop had so ordained; and there is an order to a bishop, to oblige a clergyman, who had given a title of a certain annual sum, to pay it till the clerk should be provided for; and a citation to Merton College, to show cause why they should not be obliged to maintain one, to whom they had given a title at his ordination. In like manner, the observation of this canon made in the year 1693 (or rather of the common law of the church, of which this canon is only an affirmance), was specifically enforced upon the bishops by King Charles the First and Archbishop Laud, upon this pain or penalty of maintaining the person, if they should ordain any without such title. And in ancient times, the names of the persons who granted the titles were entered in the acts of ordination, as standing engaged; as a testimony against the person entitling, in case the clerk (ordained upon such title) should at any time want convenient maintenance (*i*).

And whereas the laws of the church in this particular might be eluded, by a promise, on the part of the person ordained, not to insist upon such maintenance; we find that case considered in the ancient Gloss, and there it seems to be determined, that

(*f*) Gibs. p. 140.

(*g*) Ibid.

(*h*) The third Council of Lateran was held 1179, and enjoined by its fifth section as follows: 5. *Ne aliquis ordinatur sine certo titulo. Episcopus, si aliquem sine certo titulo de quo necessaria vitæ percipiat, in diaconum vel presbyterum ordinaverit, tandiu necessaria ei subministret, donec in aliquâ ei*

ecclesiâ convenientia stipendia militiæ clericalis assignet, nisi forte talis qui ordinatur extiterit, qui de suâ vel paternâ hereditate subsidium vitæ possit habere." See vol. x. of the folio edit. of the Councils, printed at Paris 1671. Another edition was printed at Venice, 1730.

(*i*) Gibs. p. 141.

the same being a public right cannot be released. And before that, it had been made part of the body of the canon law, that persons having made such promise, unless compassionately dispensed withal, ought not to be admitted to a higher order, nor to minister in the order already taken (*k*).

In case of letters dimissory, the rule of the canon law is, that the bishop whose business it was to see that there was a good title, shall be liable to the penalty for a person ordained without sufficient title, although another bishop ordained such person (*l*). Where letters dimissory granted.

With respect to priest's orders in particular, it is directed by the statute of 13 Eliz. c. 12, "None shall be made minister, unless it appear to the bishop that he is of honest life, and profeseth the doctrine expressed in the Thirty-nine Articles; nor unless he be able to answer and render to the ordinary an account of his faith in Latin, according to the said articles, or have special gift or ability to be a preacher." Letters testimonial.

And the ordinary way by which all this must appear to the bishop, must be by a written testimonial; concerning which it is directed by the 34th Canon of 1603, with respect both unto deacon's and priest's orders, that no bishop shall admit any person into sacred orders, except he shall "then exhibit letters testimonial of his good life and conversation, under the seal of some college of Cambridge or Oxford, where before he remained, or of three or four grave ministers, together with the subscription and testimony of other credible persons, who have known his life and behaviour for the space of three years next before."

Some of the canons abroad do further require, that proclamation be thrice made in the parish church where the person who offers himself to be ordained inhabits, in order to know the impediments if any be; which the minister of such parish is to certify to the bishop or his official: particularly, the council of Trent requires this, and that it be done by the command of the bishop, upon signification made to him, a month before, of the name of the person who desires to be ordained: not unlike to which is this clause in the articles of Queen Elizabeth, published in the year 1564, viz., "against the day of giving orders appointed, the bishop shall give open monitions to all men, to except against such as they know not to be worthy, either for life or conversation" (*m*). Other requisites by canons abroad.

Agreeable unto which are Archbishop Wake's directions to the bishops of his province in the year 1716, subjoined towards the end of this chapter, which although they have not the authority of law properly so called, yet since it is said to be discretionary in the bishop whom he will admit to the order of priest or deacon, and that he is not obliged to give any reason for his refusal (*n*), this implies, that he may insist upon what Archbishop Wake's directions.

(*k*) Gibs. p. 141.

(*l*) Ibid.

(*m*) Gibs. p. 147.

(*n*) 1 Stillingfleet, Eccl. Cas.

previous terms of qualification he shall think proper, consistent with law and right. And by the statute, rubric, and canon aforegoing, he is not required, but permitted only, to admit persons so and so qualified; and prohibited to admit any without, but not enjoined to admit any persons although they have such and such qualifications.

Examination.

By Canon 35 of 1603, "The bishop, before he admit any person to holy orders, shall diligently examine him, in the presence of those ministers that shall assist him at the imposition of hands; and if the bishop have any lawful impediment, he shall cause the said ministers carefully to examine every such person so to be ordered. Provided that they who shall assist the bishop in examining and laying on of hands shall be of his cathedral church, if they may conveniently be had, or other sufficient preachers of the same diocese, to the number of three at the least. And if any bishop or suffragan shall admit any to sacred orders who is not so qualified and examined, as before we have ordained (*o*), the archbishop of his province, having notice thereof, and being assisted therein by one bishop, shall suspend the said bishop or suffragan so offending, from making either deacons or priests for the space of two years."

Of common right, this examination pertains to the archdeacon, says Lindwood; and so says the canon law, in which this is laid down, as one branch of the archidiaconal office. Which thing is also supposed in our own form of ordination, both of priests and deacons, where the archdeacon's office is to present the persons that are apt and meet (*p*).

And for the regular method of examination, we are referred by Lindwood to the canon upon that head, inserted in the body of the canon law; viz., "When the bishop intends to hold an ordination, all who are desirous to be admitted into the ministry, are to appear on the fourth day before the ordination; and then the bishop shall appoint some of the priests attending him, and others skilled in the divine law, and exercised in the ecclesiastical sanctions, who shall diligently examine the life, age, and title of the persons to be ordained; at what place they had their education; whether they be well learned; whether they be instructed in the law of God. And they shall be diligently examined for three days successively; and so, on the Saturday, they who are approved shall be presented to the bishop" (*q*).

**Letters
dimissory.**

By a constitution of Archbishop Reynolds: "Persons of religion shall not be ordained by any but their own bishop, without letters dimissory of the said bishop; or, in his absence, of his vicar-general" (*r*).

And by Canon 34 of 1603, "No person shall henceforth admit any person into sacred orders, which is not of his own diocese,

p. 334; Johns. p. 52; Wood, b. 1,
c. 3.

(*o*) Viz., in Canon 34.

(*p*) Gibbs. p. 147.

(*q*) Ibid. See Dist. 24, c. 5.

(*r*) Lind. p. 32.

except he be either of one of the universities of this realm, or except he shall bring letters dimissory so termed from the bishop of whose diocese he is."

One of the Universities.—That is, a member of some college, so far as he may be ordained ad titulum collegii sui (*s*).

In the ancient acts of ordination, the fellows of New College, St. Mary Winton, and King's College in Cambridge, are mentioned as possessed of a special privilege from the pope, to be ordained by what bishops they pleased; and they are said to be sufficient dimissi, in virtue of that privilege, and without letters dimissory. But it does not appear by our books, that this was then that general right of all colleges in the two universities, to which they are entitled by virtue of this canon (*t*).

And by a constitution of Richard Wethershead, Archbishop of Canterbury, a bishop ordaining one of another diocese without special licence of the bishop of that diocese, shall be suspended from the conferring of that order to which he shall ordain any such person, until he shall have made a proper satisfaction (*u*).

And by Canon 35 of 1603, if any bishop or suffragan shall admit any to sacred orders who is not so qualified, he is suspended from ordaining, for the space of two years; and, by the ancient canon law, from granting letters dimissory (*x*) to the persons of his diocese who are to be ordained (*y*).

And they who shall be promoted to holy orders by other than their own bishop, without licence of their own bishop, shall be suspended from the exercise of such order until they shall obtain a dispensation (*z*).

But a dispensation in such case by their own bishop shall be sufficient, who may ratify such ordination (*a*).

And in our ecclesiastical records we find several persons dispensed with, in form, for obtaining orders without such letters, as a great irregularity, which was looked upon as needful for the ratification of the order received (*b*).

The archbishop, as metropolitan, may not grant letters dimissory, but this is to be understood with an exception to the time of his metropolitical visitation of any dioceses, during which he may both grant letters dimissory and ordain the clergy of the diocese visited (*c*). Archbishop.

So neither the archdeacon, nor official, may grant letters dimissory. Concerning the archdeacon, the canon law is express; and as to the officials, they are excluded by the same constitution that excludes the religious; and the ancient Gloss., speaking of officials, says, Although it cannot be denied that they have Official.

(*s*) Grey, p. 45.

(*t*) Gibs. p. 142.

(*u*) Lind. p. 32.

(*x*) *Literæ dimissoriales*, in Tridentine language, *commendatiæ reverendæ*. Conc. Trid. Sess. vii. c. 10.

(*y*) Gibs. p. 143.

(*z*) Lind. p. 26.

(*a*) Ibid.

(*b*) Gibs. p. 142.

(*c*) Gibs. p. 143.

ordinary jurisdiction, yet recourse is not to be had to them in every thing, for they cannot grant letters commendatory for orders (*d*).

During the vacancy of any see, the right of granting letters dimissory within that see, rests in the guardian of the spiritualities; and, in consequence, the right of ordaining also, where such guardian is of the episcopal order (*d*).

A bishop being in parts remote, he who is specially constituted vicar-general for that time, has power to grant letters dimissory; and the reason is, because during that time, the whole episcopal jurisdiction is vested in him; as it is also in persons who enjoy jurisdictions entirely exempt from the bishop, and who therefore may likewise grant them (*d*).

To whom
letters
dimissory
granted.

The persons to whom letters dimissory may be granted by any bishop, are either such who were born in the diocese, or are promoted in it, or are resident in it. This appears from Lindwood, in his commentary upon the foregoing constitution of Archbishop Reynolds, whose observation is taken from the body of the canon law. But although this is laid down disjunctively, so as letters dimissory granted in any of the three cases will be good, yet it appears in practice, that heretofore they were judged to come more properly from the bishop in whose diocese the person was born, or had long dwelt, than from the bishop in whose diocese he was promoted, or in which his title lay. And the reason was, because the bishop in whose diocese the person was born, or had long dwelt, is presumed to have the best opportunity of knowing the conversation of the person to be ordained.

The fitness of the person to be ordained (as to life, learning, title, and the like) ought to appear, before the granting of letters dimissory. This is supposed (as to conversation at least) in what has been said before; and as to the title, it was not only inquired into by the bishop granting the letters, but frequently remained with him, of which special notice was taken in the body of such letters. And the bishop who grants the letters dimissory is to make this inquiry, and not the bishop to whom such letters are transmitted, for he is to presume that the persons recommended to him are fit and sufficient (*e*).

Letters dimissory may be granted at once to all orders, and directed to any catholic bishop at large. And this has been the practice in the Church of England, both before and since the Reformation, as appears by innumerable instances, in the acts of ordination, of *littere dimissoriæ ad omnes*, and by the forms of the letters dimissory (whether *ad omnes* or not) which are directed in that general style. But other churches, to prevent the inconveniences of this practice (especially where such letters are granted without previous examination), have expressly forbid them both (*f*).

(*d*) Gibs. p. 143.

(*e*) Gibs. p. 144.

(*f*) Ibid.

SECT. 7.—*Oaths and Subscriptions previous to Ordination.*

By Canon 36 of 1603, as revised in 1865, "No person shall hereafter be received into the ministry, nor either by institution or collation admitted to any ecclesiastical living, nor suffered to preach, to catechise, or to be a lecturer or reader of divinity in either university or in any cathedral or collegiate church, city, or market town, parish church, chapel, or in any other place within this realm, except he be licensed either by the archbishop, or by the bishop of the diocese where he is to be placed, under their hands and seals, or by one of the two universities under their seal likewise; and except he shall first make and subscribe the following declaration, which, for the avoiding all ambiguities, he shall subscribe in this order and form of words, setting down both his christian and surname, viz. :—

Subscription
by canon.

"I, A. B., do solemnly make the following declaration :—

"I assent to the Thirty-nine Articles of Religion, and to the Book of Common Prayer, and of the ordering of bishops, priests, and deacons: I believe the doctrine of the United Church of England and Ireland, as therein set forth, to be agreeable to the word of God; and in public prayer and administration of the sacraments, I will use the form in the said book prescribed, and none other, except so far as shall be ordered by lawful authority.

"And if any bishop shall ordain, admit, or licence any as is aforesaid, except he first have declared and subscribed in manner and form as here we have appointed, he shall be suspended from giving of orders and licences to preach for the space of twelve months. But if either of the universities shall offend therein we leave them to the danger of the law and his Majesty's censure."

By 28 & 29 Vict. c. 122, ss. 4, 9, and 31 & 32 Vict. c. 72, the only oath now required to be taken is that of allegiance, which is as follows :—

Oath by
statute.

"I — do swear that I will be faithful and bear true allegiance to her Majesty Queen Victoria, her heirs and successors, according to law. So help me God."

Between the passing of 28 & 29 Vict. c. 122 and 31 & 32 Vict. c. 72, the oath to be taken was one of allegiance and supremacy, contained in 21 & 22 Vict. c. 48, s. 1 (g).

By s. 11 of 28 & 29 Vict. c. 122, no oath except the oath of canonical obedience is to be taken in the ordination service. This oath or vow differs slightly in words, but probably is in substance the same, for deacons and priests. The Privy Council in the case of *Long v. Bishop of Capetown* observed upon it as follows: "The oath of canonical obedience does not mean that the clergyman will obey all the commands of the bishop against

Oath of
canonical
obedience.

which there is no law, but that he will obey all such commands as the bishop by law is authorized to impose (*h*).

SECT. 8.—*Form and Manner of Ordaining Deacons.*

Presence of
priests with
bishop re-
quired at
ordination.

The ordination (as well of deacons as of ministers) shall be performed "in the time of divine service, in the presence not only of the archdeacon, but of the dean and two prebendaries at the least, or (if they shall happen by any lawful cause to be let or hindered) in the presence of four other grave persons, being masters of arts at the least, and allowed for public preachers" (*i*).

And by 21 Hen. 8, c. 13, s. 24 (now repealed), it is alleged as one reason why a bishop may retain six chaplains, because he must occupy six chaplains at the giving of orders.

However, in practice, a less number than is required either by the said statute or by the aforesaid canon, is sometimes admitted; and this (as it is said) by virtue of the rubric in the office of ordination, which directs that the bishops with the priests present shall lay their hands upon the persons to be ordained; implying, as is supposed, that if there are but two priests present, it suffices by this rubric, which is established by the act of parliament of 14 Car. 2, c. 4. But the words do not seem so much to be restrictive of the number before required, as directory what that number as by law before required in this respect shall do.

Warning
before ordina-
tion.

And at the time of ordination, the bishop shall say unto the people, "Brethren, if there be any of you, who knoweth any impediment, or notable crime, in any of these persons presented to be ordered deacons, for the which he ought not to be admitted to that office, let him come forth in the name of God, and show what the crime or impediment is" (*k*).

And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime (*l*).

Imposition
of hands.
Words of
ordination.

Then the bishop, laying his hands severally upon the head of every one of them, humbly kneeling before him, shall say, "Take thou authority to execute the office of a deacon in the Church of God committed unto thee: In the name of the Father, and of the Son, and of the Holy Ghost. Amen."

Then shall the bishop deliver to every one of them the New Testament, saying, "Take thou authority to read the Gospel in the Church of God, and to preach the same, if thou be thereto licensed by the bishop himself" (*l*).

(*h*) 1 Moo. P. C. C. N. S. p. 465.

(*i*) Can. 31 of 1603, continued
from p. 92.

(*k*) Form of Ordination.

(*l*) Ibid.

Finally, it must be declared unto the deacon, that he must continue in that office of a deacon the space of a whole year (except for reasonable causes it shall otherwise seem good unto the bishop), to the intent he may be perfect and well expert in the things appertaining to the ecclesiastical administration; in executing whereof, if he be found faithful and diligent, he may be admitted by his diocesan to the order of priesthood (*m*).

SECT. 9.—*Form and Manner of Ordaining Priests.*

Canon 32 of 1603: "The office of deacon being a step or degree to the ministry, according to the judgment of the ancient fathers and the practice of the Primitive Church, we do ordain and appoint that hereafter no bishop shall make any person, of what qualities or gifts soever, a deacon and a minister both together upon one day; but the order in that behalf prescribed in the book of making and consecrating bishops, priests and deacons be strictly observed. Not that always every deacon should be kept from the ministry for a whole year, when the bishop shall find good cause to the contrary, but that there being now four times appointed in every year for the ordination of deacons and ministers, there may ever be some time of trial of their behaviour in the office of deacon before they be admitted to the order of priesthood."

Deacons not to be made ministers at once.

At the time of ordination, the bishop shall say unto the people: "Good people, these are they whom we purpose, God willing, to receive this day unto the holy office of priesthood: for, after due examination, we find not to the contrary, but that they be lawfully called to their function and ministry, and that they be persons meet for the same. But yet if there be any of you, who knoweth any impediment or notable crime in any of them, for the which he ought not to be received into this holy ministry, let him come forth in the name of God and show what the crime or impediment is."

Warning before ordination.

"And if any great crime or impediment be objected, the bishop shall surcease from ordering that person, until such time as the party accused shall be found clear of that crime" (*m*).

Then the bishop, with the priests present, shall lay their hands severally upon the head of every one that receives the order of priesthood; the receivers humbly kneeling upon their knees, and the bishop saying, "Receive the Holy Ghost for the office and work of a priest in the Church of God, now committed unto thee by the imposition of our hands: Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained. And be thou a faithful dispenser of the

Imposition of hands.

Words of ordination.

(*m*) Form of Ordination.

word of God, and of His holy sacraments: In the name of the Father, and of the Son, and of the Holy Ghost. Amen."

Then the bishop shall deliver, to every one of them kneeling, the Bible into his hand, saying, "Take thou authority to preach the word of God, and to minister the holy sacraments in the congregation, where thou shalt be lawfully appointed thereunto."

What
assistants to
be present.

With the Priests present.]—By Can. 35 of 1603, "They who assist the bishop in laying on of hands, shall be of the cathedral church, if they may be conveniently had, or other sufficient preachers of the same diocese, to the number of three at the least."



SECT. 10.—*Fees for Ordination.*

By constitu-
tion of
Archbishop
Stratford.

By a constitution of Archbishop Stratford: For any letters of orders, the bishops, clerks or secretaries shall not receive above 6*d.*; and for the sealing of such letters, or to the marshals of the bishop's house for admittance, to porters, hostiaries or shavers nothing shall be paid: on pain of rendering double within a month, and for default thereof, the offender, if he is a clerk beneficed, shall be suspended from his office and benefice; if he is not beneficed or a lay person, he shall be prohibited from the entrance of the church till he comply (*n*).

Marshals.]—They who govern the hall and inner parts of the house (*o*).

Hostiaries.]—Lindwood understands this word to signify the same as ostiaries, or persons appointed to keep the doors, and the word *janitores* (porters) next foregoing to signify those who keep the gates, whereas, more properly, it seems that *janitores* (or porters) does express both of these, and that the word *hostiarii* (as Dr. Gibson observes) denotes those persons who prepared the host; for there is in the Roman pontifical a rubric in the ordination of priests, that the bishop shall deliver to the person to be ordained, the cup with wine and water, and the paten laid upon it with the host, the bishop saying unto him, "Take thou authority to offer sacrifice to God, and to celebrate mass as well for the living as for the dead, in the name of God" (*p*).

Shavers.]—Whose office was to shave the crowns of persons to be ordained (*q*).

By canon.

And by Can. 135 of 1603, "No fee or money shall be received either by the archbishop or any bishop or suffragan, either directly or indirectly, for admitting any person into sacred orders; nor shall any other person or persons under the said archbishop, bishop or suffragan, for parchment, writing, wax, sealing, or any other respect thereunto appertaining, take above 10*s.*: under such pains as are already by law prescribed."

(*n*) Lind. p. 222.

(*o*) Ibid.

(*p*) Gibs. p. 153.

(*q*) Lind. p. 222.

Or any other respect thereunto appertaining—above 10s.]—It is not lawful to give any thing to the notary performing the duty of his office in the act of ordination; nevertheless, it was otherwise as to that notary or registrar who writes letters testimonial for those that are ordained, for his just salary, or somewhat more for his extraordinary trouble, although this may more securely be given voluntarily without a preceding compact (r).

And some of the modern constitutions abroad agreeing to the reasonableness of this, have by way of restraint upon the officer, fixed the fee of writing and the other particulars, in like manner as this canon and the foregoing constitution of Archbishop Stratford have done in our Church. For the letters testimonial of ordination are no part of the ordination, but only taken afterwards for the security of the person ordained; and therefore the writer in the place above mentioned says, "It is safe (not necessary) for the persons ordained, to have with them the said writing or letters testimonial of ordination under the bishop's seal, containing the names of the persons ordaining and of the person ordained, and the taking of such orders, and the time and place of ordination and the like" (s).

By 30 & 31 Vict. c. 135, the two archbishops, their vicars-general and the lord chancellor, with the consent of the lords of the treasury, were empowered to settle a table of fees, confirmed by Order in Council, to be paid to "chancellors or vicars-general, registrars, secretaries, and other officers, on the consecration of churches, chapels, cemeteries and burial grounds on and incidental to the grant of faculties, and on the ordination of deacons and priests, and to the chancellors or vicars-general, registrars, and other officers of archbishops and bishops, and to archdeacons and their officials and other officers in the visitation of such archbishops and bishops and archdeacons respectively." A table of fees fixed according to this statute was published in the London Gazette of March 19, 1869.

By statute
and Order in
Council.

This table, so far as it relates to fees on ordination, is as follows:—

	Registrar or other Officer by usage performing the Duty.	Secretary of Archbishop or Bishop.
5. Ordination.	5s.	£2 : 2s.

There is appended to the table a note as to ordination fees as follows:—

"5. The registrar's fee is for registering the names and titles of the candidates in the register books of the diocese. The

(r) Otho. Athon, p. 16.

(s) Gibs. p. 154.

secretary's fee is for correspondence with the candidates, the drawing of papers and instructions prior to examination, attendance at the ordination, preparing the letters of orders, and entering the names and titles of the candidates in the Bishop's Act Book."

SECT. 11.—*Simoniacal Promotion to Orders.*

Simoniacal promotion to orders forbidden by statute.

By 31 Eliz. c. 6, s. 9, If any person shall receive or take any money, fee, reward, or any other profit directly or indirectly, or shall take any promise, agreement, covenant, bond, or other assurance to receive or have any money, fee, reward, or any other profit directly or indirectly, either to himself or to any other of his friends (all ordinary and lawful fees only excepted), for or to procure the ordaining or making of any minister, or giving of any orders or licence to preach, he shall forfeit 40*l.*, and the person so corruptly ordained 10*l.*; and if at any time within seven years next after such corrupt entering into the ministry or receiving of orders, he shall accept any benefice or promotion ecclesiastical, the same shall be void immediately upon his induction, investiture or installation, and the patron shall present or collate, or dispose of the same as if he were dead (*t*).

SECT. 12.—*General Office of Deacons.*

Prayer book as to office of deacon.

"It appertaineth to the office of a deacon, in the church where he shall be appointed to serve, to assist the priest in divine service, and specially when he ministereth the Holy Communion, and to help him in the distribution thereof, and to read Holy Scriptures, and homilies in the church; and to instruct the youth in the catechism; in the absence of the priest to baptize infants; and to preach if he be admitted thereto by the bishop. And furthermore, it is his office, where provision is so made, to search for the sick poor and impotent people of the parish, and to intimate their estates, names and places where they dwell, unto the curate, that by his exhortation they may be relieved with the alms of the parishioners or others" (*u*).

Duty to assist priest.

To assist the Priest in Divine Service.]—Anciently, he officiated under the presbyter, in saying responses and repeating the Confession, the Creed and the Lord's Prayer after him, and in such other duties of the church as now properly belong to our parish clerks; who were heretofore real clerks attending the parish priest in those inferior offices (*x*).

(*t*) Vide *infra*, Part IV., Chap. III., sect. 3.

(*u*) Ordination Service.

(*x*) *Gibs.* p. 150.

And specially when he ministereth the Holy Communion.]—By 14 Car. 2, c. 4, s. 10, no person “shall presume to consecrate and administer the holy sacrament of the Lord’s Supper before such time as he shall be ordained priest” on pain of 100*l.*, half to the king, and half to be equally divided between the poor of the parish where the offence shall be committed, and him who shall sue in any of his majesty’s courts of record; and to be disabled from being admitted to the order of priest for one whole year then next following (*y*).

Statutory prohibition of administering sacrament of Lord’s Supper.

And to read the Holy Scriptures.]—This power is expressly given to him in the act of ordination before mentioned.

Other powers and duties of a deacon.

To search for the Sick, Poor and Impotent.]—This is the most ancient duty of a deacon, and the immediate cause of the institution of the order. This rule was made in England while the poor subsisted chiefly by voluntary charities, and before the settlement of rates or other fixed and certain provisions (*z*).

And to intimate their Estates, Names and Places where they Dwell, unto the Curate.]—That is, to the rector or vicar, who has the cure of souls.

And here it is obvious to remark the ambiguity of the word curate, like the word minister; sometimes it expresses the person, whether priest or deacon, who officiates under the rector or vicar, employed by him as his assistant, or to supply the place in his absence; sometimes it denotes the person officiating in general, whether he be rector, vicar, or assistant curate, or whosoever performs the service for that time: sometimes it denotes exclusively (as in this place) the rector, vicar, or person beneficed, who has the cure of souls.

So far the office of a deacon is to be collected from the service of ordination, and from the form itself. And forasmuch as he is thereby permitted to baptize, catechise, to preach, to assist in the administration of the Lord’s Supper; so also, Dr. Watson observes, by parity of reason he has used to solemnize matrimony, and to bury the dead (*a*).

And in general it seems that he may perform all the other offices in the liturgy, which a priest can do, except only consecrating the sacrament of the Lord’s Supper (as has been said), and except also the pronouncing of the absolution.

Here we may observe the ambiguous signification of the word priest, as before was observed of the words minister and curate; sometimes it is understood to signify a person in priest’s orders only; at other times, and especially in the rubric, it is used to signify the person officiating, whether he be in priest’s or only in deacon’s orders: and in general, the words priest, minister, and curate seem indiscriminately to be applied throughout the

(*y*) Vide infra, Part III., Chap. XI., sect. 6.

(*z*) Gibbs. p. 159.

(*a*) Wats. c. 14, p. 146. As to marriage, vide infra, Part III., Chap. VII., sect. 8.

Liturgy, to denote the clergyman who is officiating, whether he be rector, vicar, assistant curate, priest, or deacon.

The argument to evince that the priest only, and not a deacon, has power to pronounce the Absolution, seems most evidently to be deduced from the acts of ordination before mentioned. To the deacon, it is said, "Take thou authority to read the gospel, and to preach:" to the priest, it is said, "Receive the Holy Ghost. . . . Whose sins thou dost forgive, they are forgiven; and whose sins thou dost retain, they are retained."

Deacons not capable of benefices.

Moreover, until a person is admitted to the order of priesthood, he is not capable of any benefice or ecclesiastical promotion (*b*).

Dr. Gibson refers to 13 Eliz. c. 12, which enacts, on this point, that no person shall be admitted to any benefice with cure unless he be of the age of three and twenty years, and a deacon at the least; and directs that every person admitted to a benefice with cure shall be admitted to minister the sacraments within one year after his induction, if he be not so admitted before, under pain of deprivation. But 14 Car. 2, c. 4, s. 10, extends the restriction by declaring, that no person shall be capable to be admitted to any benefice, nor to administer the sacrament, before such time as he shall be ordained priest, according to the form prescribed by the Book of Common Prayer, under the penalty of 100*l*. and disability to be admitted into the order of priest for the space of one year next following.

And by the same section, no person shall be capable to be admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity, before he be ordained priest: on pain of 100*l*.; half to the king, and half to be equally divided between the poor and the informer.

Not even donatives.

Neither is a person that is merely a layman, or that is only a deacon, capable of a donative: for although he who has a donative may come into the same by lay donation, and not by admission and institution, yet his function is spiritual (*c*).

So that he who is no more than a deacon can only use his orders either as a chaplain to some family, or as a curate to some priest, or as a lecturer without title: for the prebendaries of some prebends in cathedral and collegiate churches are to read lectures there, by the appointment of the founders thereof, and may from thence be called lecturers; but these places are of the number of ecclesiastical promotions, to which the incumbents are admitted by collation or institution, of which a deacon as aforesaid is not therefore capable; yet the king's professor of the law within the University of Oxford might, until recent statutes, have and hold the prebend of Shipton within the cathedral church of Sarum, united and annexed to the place of

Prebend of Shipton.

(*b*) Gibs. p. 146.

(*c*) 1 Inst. p. 344.

the same king's professor for the time being, although that the said professor was but a layman (*d*).

SECT. 13.—*General Office of Priests.*

A priest by his ordination receives authority to preach the word of God, and to consecrate and administer the Holy Communion, in the congregation where he shall be lawfully appointed thereunto.

Authority given to priests.

Yet, notwithstanding by Canon 36 of 1603, he may not preach without a licence either of the archbishop, or of the bishop of the diocese where he is placed, under their hands and seals, or of one of the two universities under their seals likewise.

Licence to preach.

But induction into a benefice has, for a long period, been deemed to give an authority to preach to the person inducted (*e*).

Effect of induction.

Dr. Watson says, that if a person, who is a mere layman, be admitted and instituted to a benefice with cure, and administers the sacrament, marry and the like; these, and all other spiritual acts performed by him during the time he continues parson in fact, are good; so that the persons baptized by him are not to be re-baptized, nor persons married by him to be married again, to satisfy the law (*f*).

Parson *de facto*.

SECT. 14.—*Exhibiting Letters of Orders.*

By Can. 137 of 1603, "Every parson, vicar, and curate, shall at the bishop's first visitation, or at the next visitation after his admission, show and exhibit unto him his letters of orders, to be by him either allowed, or (if there be just cause) disallowed and rejected; and being by him approved, to be signed by the registrar; the whole fees for which, to be paid but once in the whole time of every bishop, and afterwards but half the said fees."

Exhibition of letters of orders.

"No curate shall be admitted to officiate in another diocese, unless he bring with him his letters of orders" (*g*).

Can. 39. "No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first show unto him his letters of orders."

It used to be the old law in relation to the privilege called

Benefit of clergy proved

(*d*) Wats. c. 14, pp. 146, 147; 14 Car. 2, c. 4, s. 29.

(*e*) See *Bp. of Down and Connor v. Miller*, 11 Ir. Ch. Appendix, p. 1; and 5 L. T. N. S. p. 30.

(*f*) Wats. c. 14, p. 147; *Costard v. Windler*, Cro. Eliz. p. 775; *Hawke v. Corri*, 2 Consist. p. 288; vide *infra*, Part III., Chap. VII., sect. 8.

(*g*) Lind. p. 48.

by letters of
orders or
certificate.

Forgery of
letters of
orders.

“benefit of clergy,” that it must be proved by letters of orders, or a certificate by the ordinary. See 4 Hen. 7, c. 13.

Letters of orders are not a deed; so as to make the forging of them felony (*h*).



SECT. 15.—*Archbishop Wake's Directions in relation to Orders.*

Archbishop
Wake's
directions as
to orders.

It is judged proper here to subjoin Archbishop Wake's letter to the bishops of the province of Canterbury, dated June 5, 1716, which, although it concerns other matters besides those of ordination, yet since the due conferring of orders appears to be the principal regard thereof, it seems best to insert the same entire in this place; and to refer to it here at large from those other places, unto which it has some relation.

As to its authority, it is certain (as has been observed before) that in itself it has not the force of law, nor is it so intended, or to be of any binding obligation to the church, further than the archbishops and bishops from time to time shall judge expedient; I mean as to those parts of it which only concern matters that the law has left indefinite, and discretionary in the archbishops and bishops. Other parts thereof are only inforcements of what was the law of the church before; and those, without doubt, are of perpetual obligation: not by the authority of these injunctions but by virtue of the laws upon which they are founded.

“My very good lord,

“Being by the providence of God called to the metropolitical see of this province, I thought it incumbent upon me to consult as many of my brethren, the bishops of the same province, as were here met together, during this session of parliament, in what manner we might best employ that authority which the ecclesiastical laws now in force, and the custom and laws of this realm, have vested in us, for the honour of God, and for the edification of his Church, committed to our charge: And upon serious consideration of this matter, we all of us agreed in the same opinion that we should, by the blessing of God upon our honest endeavours, in some measure promote these good ends, by taking care (as much as in us lieth) that no unworthy persons might hereafter be admitted into the sacred ministry of the Church: nor any be allowed to serve as curates but such as should appear to be duly qualified for such an employ; and that all who officiated in the room of any absent ministers, should reside upon the cures which they undertook to supply, and be ascertained of a suitable recompence for their labours.

"In pursuance of those resolutions, to which we unanimously agreed, I do now very earnestly recommend to you ;

"(I.) That you require of every person who desires to be admitted to holy orders, that he signify to you his name and place of abode, and transmit to you his testimonial, and a certificate of his age duly attested, with the title upon which he is to be ordained, at least twenty days before the time of ordination ; and that he appear on Wednesday, or at farthest on Thursday in Ember week, in order to his examination.

"(II.) That if you shall reject any person who applies for holy orders, upon the account of immorality proved against him, you signify the name of the person so rejected, with the reason of your rejecting him, to me, within one month ; that so I may acquaint the rest of my suffragans with the case of such rejected person before the next ordination.

"(III.) That you admit not any person to holy orders, who having resided any considerable time out of the university, does not send to you, with his testimonial, a certificate signed by the minister, and other credible inhabitants of the parish where he so resided, expressing that notice was given in the church, in time of divine service, on some Sunday, at least a month before the day of ordination, of his intention to offer himself to be ordained at such a time ; to the end that any person who knows any impediment, or notable crime, for which he ought not to be ordained, may have opportunity to make his objections against him.

"(IV.) That you admit not letters testimonial, on any occasion whatsoever, unless it be therein expressed, for what particular end and design such letters are granted ; nor unless it be declared by those who shall sign them, that they have personally known the life and behaviour of the person for the time by them certified ; and do believe in their conscience, that he is qualified for that order, office, or employment, to which he desires to be admitted.

"(V.) That in all testimonials sent from any college or hall, in either of the universities, you expect that they be signed, as well as sealed ; and that among the persons signing, the governor of such college or hall, or, in his absence, the next person under such governor, with the dean, or reader of divinity, and the tutor of the person to whom the testimonial is granted (such tutor being in the college, and such person being under the degree of master of arts), do subscribe their names.

"(VI.) That you admit not any person to holy orders upon letters dimissory, unless they are granted by the bishop himself, or guardian of the spiritualities *sede vacante* ; nor unless it be expressed in such letters, that he who grants them, has fully satisfied himself of the title and conversation of the person to whom the letter is granted.

"(VII.) That you make diligent inquiry concerning curates in your diocese, and proceed to ecclesiastical censures against

those who shall presume to serve cures without being first duly licensed thereunto; as also against all such incumbents who shall receive and employ them, without first obtaining such licence.

“(VIII.) That you do not by any means admit of any minister, who removes from any other diocese, to serve as a curate in yours, without testimony of the bishop of that diocese, or ordinary of the peculiar jurisdiction from whence he comes, in writing, of his honesty, ability, and conformity to the ecclesiastical laws of the Church of England.

“(IX.) That you do not allow any minister to serve more than one church or chapel in one day, except that chapel be a member of the parish church, or united thereunto; and unless the said church or chapel where such a minister shall serve in two places, be not able in your judgment to maintain a curate.

“(X.) That in the instrument of licence granted to any curate, you appoint him a sufficient salary, according to the power vested in you by the laws of the church, and the particular direction of a late act of parliament for the better maintenance of curates.

“(XI.) That in licences to be granted to persons to serve any cure, you cause to be inserted, after the mention of the particular cure provided for by such licences, a clause to this effect ‘or in any other parish within the diocese, to which such curate shall remove with the consent of the bishop.’

“(XII.) That you take care, as much as possible, that whosoever is admitted to serve any cure, do reside in the parish where he is to serve; especially in livings that are able to support a resident curate: and where that cannot be done, that they do at least reside so near to the place that they may conveniently perform all their duties both in the church and parish.

“These, my lord, were the orders and resolutions, to which we all agreed; and which I do hereby transmit to you; desiring you to communicate them to the clergy of your diocese, with an assurance that you are resolved, by the grace of God, to direct your practice in these particulars agreeably thereunto. And so commending you to the blessing of God in these, and all your other pious endeavours for the service of his Church, I heartily remain,

My very good lord,

Your truly affectionate brother,
W. CANT.”

Commentary
on arch-
bishop's
letter.

(III.) In the later directions, as delivered by the archbishops in after years, there was an alteration in this article: instead of the expression, that the minister and others shall certify “that notice was given in the church of his intention to offer himself to be ordained at such a time, to the end that any person who knows any impediment or notable crime, for the which he ought not to be ordained, may have opportunity to make his objections against him,” (that is, to the bishop, as it seems);—it then ran,

that they shall certify, "that such notice was given, and that upon such notice given no objections have come to their knowledge, for the which he ought not to be ordained," (which implies the objections to be notified to the persons signing the certificate).

(X.) The act here referred to is that of 13 Ann. c. 11, now repealed, for the curates of non-residents only; by which the ordinary had power, according to the value of the living and the difficulty of the cure, to appoint a salary not exceeding fifty pounds a year, nor less than twenty (*a*).

(XI.) The clause to be inserted in the licence, that the same shall serve for any other parish within the diocese, was omitted out of the later directions.

This letter was republished for some years : and to these directions two others were subjoined : Later directions.

One is, That you be very cautious in accepting resignations; and endeavour, with the utmost care, by every legal method, to guard against corrupt and simoniacal presentations to benefices. This seems to be intended to counteract the purpose of bonds of resignation; for if the bishop will not accept, the resignation is ineffectual.

The other is, That your clergy be required to wear their proper habits, preserving always an evident and decent distinction from the laity in their apparel; and to show, in their whole behaviour, that seriousness, gravity and prudence, which becomes the function; abstaining from all unsuitable company and diversions. The word "canonical," with respect to the habit, seems to have been purposely omitted; since no certain standard of dress can be conveniently limited by any canon or other law; and therefore general directions can only be applicable in such cases.

In practice, at the present time there are the following instruments to be transmitted to the bishop before the time of ordination, by every person desiring to be ordained; viz. :—

Summary of
requisites for
candidates for
holy orders.

First, a certificate or other proof of baptism.

Secondly, a certificate (called *Si quis*) of publication having been made in the church, of his design to enter into holy orders.

Thirdly, letters testimonial of his good life and behaviour.

Fourthly, certificate of his age, if not otherwise proved.

Fifthly, the title upon which he is to be ordained.

Sixthly, some proof of proficiency in divinity is also required both from graduates of the universities and from non-graduate candidates. The requirements of the bishops, however, on this head are not matters of law and may vary.

And moreover, if the candidate comes for priest's orders, he must exhibit to the bishop his letters of orders for deacon.

(*a*) Vide infra, Part II., Chap. X.

Form of a Testimonial for Orders.

"To the Right Reverend —, by Divine Permission Lord Bishop of —.
 "Whereas our beloved in Christ, A. B., bachelor of arts of — College, in the University of —, hath declared to us his intention of offering himself as a candidate for the sacred office of a Deacon, and for that end hath requested of us letters testimonial of his good life and conversation; We therefore, whose names are hereunto subscribed, do testify that the said A. B. hath been personally known to us for the space of — last past; that we have had opportunities of observing his conduct; that during the whole of that time we verily believe that he lived piously, soberly, and honestly; nor have we at any time heard anything to the contrary thereof; nor hath he at any time, so far as we know or believe, held, written, or taught anything contrary to the doctrine or discipline of the Church of England; and moreover we believe him, in our consciences, to be, as to his moral conduct, a person worthy to be admitted to the sacred order of Deacons.

"In witness whereof we have hereunto subscribed our names, this — day of — in the year of our Lord,

"C. D., Rector of —.

"E. F., Vicar of —.

"G. H., Vicar of —."

SECT. 16.—Foreign Ordination.

The important question as to the effect of foreign ordination (*i*) on the capacity of those so ordained to hold offices in the English Church, and conversely the authority, canonical and constitutional, to ordain ministers who are to discharge their functions out of England, will be considered in a later chapter (*k*). It may be as well to observe here that the following statutes relate to this subject:—

Statutes upon
this subject.

24 Geo. 3, sess. 2, c. 35, "An act to empower the Bishop of London for the time being, or any other bishop to be by him

(*i*) The sequel of the passage from the Preface to the Ordination Service cited above, p. 89, is, "And therefore to the intent that these orders may be continued, and reverently used and esteemed in the Church of England; No man shall be accounted or taken to be a lawful bishop, priest or deacon in the Church of England, or suffered to execute any of the said functions, except he be called, tried, examined and admitted thereunto according to the form hereafter following, or hath had formerly episcopal consecration or ordination." On these last words, Bishop Gibson remarks, "This last clause seems designed to allow of Romish converted priests, who were ordained by bishops before, and whom we re-

ceive without re-ordination (if they renounce their errors), because that church preserves the order of bishops and the substance of the primitive forms in her ordinations, though corrupted with many modern superstitious rites." Compare 14 Car. 2, c. 4, § 10, "unless he have formerly been made a priest by episcopal ordination," and the 3rd sect. of 39 Geo. 3, c. 60, and the 6th sect. of 3 & 4 Vict. c. 33. There have been several instances of Roman priests admitted into our church; but I am not aware of any case which has given rise to a discussion on the validity of orders conferred by a bishop of the Greek Church. See Palmer *Origines Liturgicæ*.

(*k*) Vol. II., Part X., Chap. VI.

appointed, to admit to the order of deacon or priest persons being subjects or citizens of countries out of His Majesty's dominions without requiring them to take the oath of allegiance as appointed by law."

26 Geo. 3, c. 84, "An act to empower the Archbishop of Canterbury or the Archbishop of York for the time being to consecrate to the office of a bishop persons being subjects or citizens of countries out of His Majesty's dominions." (*Now repealed.*)

59 Geo. 3, c. 60, "An act to permit the Archbishops of Canterbury and York and the Bishop of London for the time being to admit persons into holy orders specially for the Colonies."

3 & 4 Vict. c. 33, "An act to make certain provisions and regulations in respect to the exercise within England and Ireland of their office by the bishops and clergy of the Protestant Episcopal Church in Scotland; and also to extend such provisions and regulations to the bishops and clergy of the Protestant Episcopal Church in the United States of America; and also to make further regulations in respect to bishops and clergy other than those of the United Church of England and Ireland." (*Now repealed.*)

5 Vict. c. 6, "An act to amend an act made in the twenty-sixth year of the reign of His Majesty King George the Third, intituled 'An act to empower the Archbishop of Canterbury or the Archbishop of York for the time being to consecrate to the office of a bishop persons being subjects or citizens of countries out of His Majesty's dominions.'"

15 & 16 Vict. c. 52, "An act to enable Colonial and other bishops to perform certain episcopal functions under commission from bishops of England and Ireland."

16 & 17 Vict. c. 49, "An act to extend the provisions of an act of the fifteenth and sixteenth years of Her present Majesty, intituled 'An act to enable Colonial and other bishops to perform certain episcopal functions, under commission from bishops of England and Ireland.'"

26 & 27 Vict. c. 121, "An act to establish the validity of acts performed in Her Majesty's possessions abroad by certain clergymen ordained in foreign parts, and to extend the powers of Colonial Legislatures with respect to such clergymen." (*Now repealed.*)

27 & 28 Vict. c. 94, "An act to remove disabilities affecting the bishops and clergy of the Protestant Episcopal Church in Scotland."

37 & 38 Vict. c. 77, "An act respecting Colonial and certain other clergy."

CHAPTER IV.

DEANS AND CHAPTERS, AND CATHEDRALS.

SECT. 1.—*Preliminary.*2.—*The General Law as to Deans and Chapters.*3.—*The Law since the Statutes of William IV. and Victoria.*4.—*The provisions as to the New Cathedrals.*5.—*Resignation of Deans and Canons.*SECT. 1.—*Preliminary.*Divisions of
subject.

THE subject of deans, chapters (a) and cathedrals in England admits of the following divisions:

The general law as to these institutions.

The law since the statutes of William the Fourth and Queen Victoria.

To these must now be added—

The provisions as to the new cathedrals.

Resignation of deans and canons.

The original council of the bishop was, as has been seen, the *presbyterium*, that is, the priests and deacons of his diocese.

(a) X. iii. 9.

Ne sede vacante aliquid innovetur, VI. iii. 8. X. iii. 10. De his quæ fiunt a prælato sine consensu capituli, X. iii. 11. De his quæ fiunt a majori parte capituli; of which c. 1 contains the following passage:—Cum in cunctis ecclesiis, quod pluribus et sanioribus fratribus visum fuerit, incunctanter debeat observari; grave nimis est, et reprehensione dignissimum, quod per quasdam ecclesias pauci quandoque non tam de ratione quam de propria voluntate ad ordinationem ecclesiasticam procedere non permittunt. Quocirca præsentī decreto statuimus, ut nisi a paucioribus et inferioribus aliquid rationabiliter objectum

fuerit et ostensum, adpellatione remota, prævaleat semper et suum consequatur effectum, quod a majori et saniori parte capituli fuerit constitutum.—C. 4 of the same title is as follows:—Ex parte tua nobis fuit, frater archiepiscopo, intimatum, quod ad restaurandam fabricam Rothomagensis ecclesiæ tractatum communiter habuistis, te postulante ut quilibet canonicorum tecum pariter aliquam suorum reddituum portionem operi tam pio et necessario deputeret. (Et infra.) Statuimus, ut si quis vestrum tuis, frater archiepiscopo et majoris et sanioris partis capituli statutis super hoc duxerit resistendum, obtineat sententia plurimorum.

Bishop Augustine, at the beginning of the fifth century, introduced the monastic common life, or *cænobium*, among his clergy. These communities gradually, during the interval between the tenth and the twelfth century, became powerful and richly endowed corporations, recognized as such not only by canons, but also by municipal law, and with cathedrals privileged beyond other churches.



SECT. 2.—*The General Law as to Deans and Chapters.*

Dr. Kennet observes in his *Parochial Antiquities*, that the origin of the different cathedral churches in this country may be traced to three different classes of institutions. First, an establishment consisting of a bishop, dean and canons, all living together at one cathedral city, whose occupation and duty was the maintenance and diffusion of religion throughout the diocese, of which the cathedral was the "*mater ecclesia*" (b).

Cathedral
chapters.
Kennet.

Of this class are all the cathedral foundations, whatever formal variations they may have undergone, which at present remain, for into this species of foundation the force of circumstances and the course of time have merged the two which follow. Secondly, the conventual cathedrals, which learned men consider almost peculiar to the English church; their constitution was formed by monks under subordination to a prior, resembling in a great degree the cathedrals governed by a dean and canons, both as to the construction of their chapter, and the nature of their privileges; eight of these conventual cathedrals were formally constituted by Henry VIII. cathedral churches, the election of their bishop being transferred from a prior and convent to a dean and chapter. Thirdly, and lastly, monasteries unconnected with any bishop, which Henry VIII. incorporated as cathedral churches with the new sees, which he raised upon the ruins of church property at the time of the Reformation.

Bishop Stillingfleet establishes, by a very learned and complete demonstration, that chapters were the bishop's council, answering to the "*collegium decurionum*" of every Roman corporation—that they were called "*episcopi confratres, consiliarii assessores, membra episcopatus*;" and he refers to the Dean and Chapter of Norwich's case in Lord Coke's report (c), the language of which should here be cited: "It was in Christian policy thought and re-thought necessary that every

Stillingfleet.

(b) Ken. *Paroch. Ant.* pp. 79 and 635.

(c) 3 Co. p. 75.

bishop should be assisted with a council, *scilicet*, with a chapter, and that for two reasons: 1st, to consult with them in matters of difficulty and to assist him in deciding of controversies of religion, to which purpose every bishop '*habet cathedram*'; 2nd, to consent to every grant, &c." And in the same case their being is declared to be so necessary that although they should "depart with their possessions, yet for necessity the corporation doth remain, as well to assist the bishop in his calling, as to give their assent to the estates, &c., which he shall make of his temporalities, &c." Bishop Stillingfleet having thus maintained their usefulness with respect to the bishop, proceeds to develop their beneficial agency: 1, in promoting the public worship of God; and 2, in propagating the Christian faith. Among other remarkable passages are the following: "The cathedral churches being thus established in the bishop and his clergy, all things were to be so ordered as might the most tend to the public worship of God, which was another end of the first institution of them, and an argument for their usefulness. For in the beginning of a church it was necessary for a bishop to have an eye to two things; first, to set up the public worship in the most decent and solemn manner, and in the places of greatest resort, and this was the foundation of cathedral churches; the second was, to gain as many converts as they could in dispersed places, and to let them want nothing that was necessary to the Christian profession, and this was the foundation of parochial churches, which were as the synagogues to the Temple at Jerusalem, being built for the conveniency of those who could not attend the solemn worship of God in the Temple. So it was in the Christian church: every cathedral in its first institution was as the Temple to the whole diocese, where the worship was to be performed in the most decent, constant, and solemn manner; for which end it was necessary to have such a number of ecclesiastical persons there attending as might still be ready to do all the offices which did belong to the Christian church: such as constant prayers and hymns, and preaching, and celebration of sacraments, which were to be kept up in such a church as the daily sacrifice was in the Temple, not only for the satisfaction of all persons who desire to know what the manner of our worship is, but that all devout persons may certainly know whither to go at certain hours to offer up their prayers and thanksgiving to God, and that in the most public and solemn manner. And upon this ground, the institution of cathedral churches among Christians was a very pious and reasonable thing. . . . From which it appears how extremely useful the first cathedral churches among the Saxons were for the conversion of the nation, and upon what great considerations the first Christian kings of the Saxons did bestow their endowments upon them, which in some measure they have ever since enjoyed; and there is reason to hope they will do, as long as Christian

princes and the due sense of our conversion to Christianity remain among us, which I hope will be to the world's end" (d).

The real purpose and object of cathedral institutions cannot be more clearly or comprehensively stated than in the language of King Henry the Eighth's Charters of Foundation—" *Ut omnis generis pietatis officia illinc exuberanter in omnia vicina loca longe lateque dimanent, ad Dei omnipotentis gloriam et ad subditorum nostrorum communem utilitatem felicitatemque.*"

Charters of
Henry VIII.

In a very interesting case relating to the cathedral of Chester, Dr. Lushington said:

Braithwaite v.
Hook.

"I think that cathedrals existed before the institution of civil parishes, and Lord Coke, the highest of all legal authority, so declares. The course seems to have been that originally the bishop and the priests subordinate to him were resident in and about the cathedral in what is called the close—precincts of the close: that these subordinate priests were from time to time sent into the country to discharge ecclesiastical duties, and this by the orders and under the control of the bishop; that for the more efficient discharge of those duties the country was marked out by the ecclesiastical authority into parishes, and thus gradually arose rectories, vicarages, and perpetual curacies. I need not specify more particularly. Certain districts were exempted from such parochial cure, and sometimes, indeed, from superior authority. Amongst these especially were monasteries. It is not doubted that the same ecclesiastical authority which marked out the boundaries of parishes for spiritual purposes could, in those days, alter them. But in course of time, when discussions and disputes arose as to the payment of tithes and value of livings, the civil courts came to determine what were the boundaries of the parishes. But this exercise of such civil jurisdiction over parishes does not, according to Lord Coke, date back earlier than 1189" (e).

The distinction between cathedral, conventual, and collegiate churches perhaps may be best understood from the description given by Lindwood of the several names: properly speaking, says he, a chapter is spoken in respect of a cathedral church; a convent in respect of a church of regulars; a college in respect of an inferior church, where there are collected together persons living in common (f).

Difference
between
cathedral,
conventual,
and collegiate
churches.

The sees of bishops ought regularly to be fixed in such towns only as are noted and populous. When this was made a rule of the church by a canon of the council of Sardica, the only design seems to have been to prevent the needless multiplication of bishops' sees; inasmuch as that canon, describing such a small

Cathedral
churches to
be in cities.

(d) Bp. Stillingfleet, Discourse of the True Antiquity of London, bound up with his Ecclesiastical Cases, Vol. II. pp. 565—587. See God. p. 56.

by Rev. G. Braithwaite against Dr. Hook, Dean of Chichester, published by Elliot, Chichester, 1862, p. 8; *S. C.*, 8 Jur. N. S. p. 1186.

(e) Office of the judge promoted

(f) *Gibs.* p. 172.

city, as within which a bishop's see should not be established, calls it such a one as a single presbyter might be sufficient for in point of numbers. But it was afterwards understood by the canon law, that of what extent or how populous soever the diocese or jurisdiction of a bishop might be, it was most agreeable to the episcopal dignity to place the see or cathedral church in some large and considerable town. Pursuant to which, with express reference to the aforesaid council, and to the decrees of Pope Leo and Pope Damasus, it was decreed in a council under Archbishop Lanfranc, that certain episcopal sees which before had been in small towns and villages, should be settled in the most noted places: and several were accordingly removed, as Dorchester to Lincoln, Selsey to Chichester, Kirton to Exeter; which rule was also observed in fixing the sees of the five new bishoprics erected by King Henry VIII. (*g*).

And every town which has a see of a bishop placed in it is thereby entitled to the honour of a city (*h*).

And Lord Coke defines a city thus: a city (says he) is a borough incorporate, which hath, or hath had, a bishop; and though the bishopric be dissolved yet the city remaineth (*i*).

But this extends not to the cathedral churches in Wales, divers of which are established in small villages.

Certain forfeitures for the repair of cathedrals.

Besides the proper revenues of cathedral churches to be applied toward the repair thereof, there were divers forfeitures by several canons of Archbishop Stratford, to be disposed of to the same purpose: viz., for the unfaithful execution of wills; for extorting undue fees for the probate of wills; for undue commutation of penance; and half the forfeitures for excessive fees at the admission of a curate.

Original institution of deaneries.

The institution of deaneries, as also of the other ecclesiastical offices of dignity and power, seems to bear a resemblance and relation to the methods and forms of civil government, which obtained in those early ages of the church throughout the western empire. Accordingly, as in this kingdom, for the better preservation of the peace, and more easy administration of justice, every hundred consisted of ten districts called tithings, every tithing of ten friborgs or free pledges, and every free (or frank) pledge of ten families; and in every such tithing there was a constable or civil dean appointed, for the subordinate administration of justice: so in conformity to this secular method, the spiritual governors, the bishops, divided each diocese into deaneries; and over every such district they appointed a dean, which in cities or large towns was called the dean of the city or town, and in the country had the appellation of rural dean (*k*).

The like office of deans began very early in the greater monas-

(*g*) Gibs. p. 171.

(*h*) Ibid.

(*i*) 1 Inst. p. 109.

(*k*) Ken. Paroch. Ant. vol. ii. pp. 337, 338.

teries, especially in those of the Benedictine order; where the whole convent was divided into decuries, in which the dean or tenth person did preside over the other nine; took an account of all their manual operations; suffered none to leave their stations, or to omit their particular duty without express leave; visited their cells or dormitories every night; attended them at table to keep order and decorum at their meals; guided their conscience; directed their studies; and observed their conversation: and for this purpose held frequent chapters, wherein they took public cognizance of all irregular practices; and imposed some lesser penances; but submitted all their proceedings to the abbat or prelate, to whom they were accountable for their power, and for the abuse of it. And in the larger houses, where the numbers amounted to several decuries, the senior dean had a special pre-eminence, and had sometimes the care of all the other devolved upon him alone (*l*).

And the office of dean in several colleges in the universities, seems to have arisen from the same foundation.

And the institution of cathedral deans seems evidently to be owing to this practice. When in episcopal sees, the bishops dispersed the body of their clergy by affixing them to parochial cures; they reserved a college of priests or secular canons for their counsel and assistance, and for the constant celebration of divine offices in the mother or cathedral church, where the tenth person had an inspecting and presiding power, till the senior or principal dean swallowed up the office of all the inferior, and in subordination to the bishop was head or governor of the whole society (*m*). His office was, to have authority over all the canons, presbyters, and vicars; and to give possession to them when instituted by the bishop; to inspect their discharge of the cure of souls; to convene chapters and preside in them, there to hear and determine proper causes; and to visit all churches once in three years within the limits of their jurisdiction. The men of this dignity were called archipresbyters, because they had a superintendence or primacy over all their college of canonical priests.

Deans of the old foundation used to come in by election of the chapter upon the king's *congé d'élire*, with the royal assent, and confirmation of the bishop, much in the same way as the bishops themselves do: but the deans of the new foundation were appointed by the king's letters patent; upon which they were instituted by their respective bishops, and then installed upon a mandate pursuant to such institution, and directed to the chapters (*n*). Dean, how appointed.

(*l*) Ken. Paroch. Ant. vol ii., pp. 339, 340.

(*m*) Ibid. p. 340.

(*n*) Gibbs. p. 173. See *Reg. v. The Chapter of Exeter*, 12 A. & E. p. 512;

but appointments are now made to English deaneries under 3 & 4 Vict. c. 113, s. 24, and to Welsh deaneries under 6 & 7 Vict. c. 77; vide *infra*, pp. 174, 185.

Which former distinction between the old and new foundations came in after the dissolution of monasteries, when King Henry VIII., having ejected the monks out of the cathedrals, placed secular canons instead of them: those whom he thus regulated are called the deans and chapters of the new foundation; such are Canterbury, Winchester, Worcester, Ely, Carlisle, Durham, Rochester, and Norwich. And besides these, he erected five cathedrals *de novo*, and endowed them out of the estates of dissolved monasteries, viz., Chester, Peterborough, Oxford, Gloucester, and Bristol: which were by him made episcopal sees, as also Westminster, but the bishopric of this last place was altered again, and the monastery finally turned into a collegiate church by Queen Elizabeth (*p*).

Deanery, how
far a sinecure.

Deaneries being considered to some extent sinecures, that is, not having the cure of souls (*q*), were exempted from the operation of the now repealed statute 21 Hen. 8, c. 13, against pluralities, by the proviso in sect. 31.

Therefore persons admitted to deaneries needed not, by 13 Eliz. c. 12, to subscribe the Thirty-nine Articles before the ordinary; nor to read and declare their assent to the same, as persons admitted to benefices with cure were required to do by the said statute (*r*).

But otherwise, the same oaths, subscriptions, and declarations are required to be taken and made by them, as by other persons qualifying for ecclesiastical benefices.

Deanery a
dignity.

The title of dean is a title of dignity; which belongs to this station as having ecclesiastical administration with jurisdiction or power annexed, as the civilians defined a dignity in the case of *Boughton v. Gousley* (*s*), and more especially as coming within all the three qualifications of a dignity as laid down by Lindwood.—“A dignity,” he says, “is known, 1. From the administration of ecclesiastical affairs with jurisdiction; 2. From the name and preference which he hath in the choir and chapter; 3. From the custom of the place.” By which rule, no stations in the cathedral church, under the degree of a bishop, are dignities strictly speaking, besides those of the dean and archdeacon; unless where jurisdiction is annexed to any of the rest, as in some cases it is to prebends and others (*t*).

This title of dignity, as annexed to deaneries, may perhaps be one reason of what the law books affirm, that if lands be given by licence to a dean and chapter of such a place, or a lease be made by them, or a writ be brought against the dean; such grant, lease, and writ, shall be good, though the dean is mentioned only by his title of dignity, and not by his proper name (*u*). But in pleadings he must show his proper name (*x*).

(*p*) Johns. p. 58.

(*q*) God. p. 200; Wats. c. 2, p. 9;
vide infra, p. 130.

(*r*) Gibs. pp. 808, 817.

(*s*) Cro. Eliz. p. 633.

(*t*) Gibs. p. 173.

(*u*) Gibs. p. 173; 1 Inst. p. 3 a.

(*x*) 1 Inst. p. 3 a; *Dean and Chapter of Rochester v. Pierce*, 1 Camp. p. 466.

If a dean take an obligation to him and his successors, it goes to his executors; which holds true also as to a bishop, parson, vicar, and the like (*y*). A bond is a chattel, and regularly no chattel can go in succession in a case of a sole corporation (*z*), but may by custom, as in the case of the chamberlain of London (*a*).

Bond given to a dean and his successors.

According to the old law, the bishop, dean, and chapter (that is, prebendaries or canons), and all other persons belonging unto, or having any thing to do in any cathedral churches, at the first, and in ancient times, held their possessions together in gross; but afterwards for the avoiding of confusion and for better order, and for some other special causes known to the king and state of this realm, the same were by them severed and divided; and part of the lands and possessions belonging to the same church were assigned to the bishop and his successors to hold by themselves, and other parts thereof were assigned unto the dean and chapter to hold by themselves, of which lands they have ever since continued severally seised in their several capacities.

Possessions of deaneries.

Concerning the possessions of deans and others of the new foundation, it is enacted by 34 & 35 Hen. 8, c. 21, that "the king's grant to the new foundation should be good; notwithstanding any misrecital of name, place, or date."

And by 35 Eliz. c. 3, reciting that divers doubts have arisen touching the surrenders of religious houses, and the validity of the erections of deans and chapters made by King Henry VIII., notwithstanding the aforesaid statute; it is enacted, that all estates of religious houses surrendered to King Henry VIII. shall be adjudged to have been lawfully in the possession of the said king, notwithstanding any defect in the surrender; and all letters patent made by the said king, for the erection, foundation, incorporation, or endowment of any dean and chapter, shall be reputed, taken, and adjudged, to have been good, perfect, and effectual in the law, for all things therein contained, according to the true intent and meaning of the same, any thing, matter, or cause, to the contrary thereof in any wise notwithstanding.

Many years before this, in the eighth year of the queen, we find a bill in the House of Lords (for the confirmation of late erected deaneries and prebends) read a second time and committed; but it proceeded no further. Whereupon great disturbance having been given to the deans and chapters of the new foundation, under pretence that the possessions thereof were passed by letters patent of concealment, they did this year unanimously apply themselves to the lord treasurer, Burleigh, for a confirmation of them by parliament: as appears from a letter sent by them from the convocation house, bearing

(*y*) God. p. 55, vide supra, p. 65. (*a*) *Fulwood's case*, 4 Co. p. 64.

(*z*) 1 Inst. p. 46 b.

date March 16, 1592, in which they beseech him, "that by his honourable mediation and countenance, a remedy may at this parliament (by confirmation of the said grants) be obtained."

This application produced the act of 35 Eliz. c. 3, in favour of the new foundations; notwithstanding which, five years after, divers persons, labouring a dissolution of the cathedral church of Norwich, under the old pretence of concealments, brought this matter to a solemn hearing; and it was declared, that if any imperfections were in the translation made by King Henry VIII. from prior and convent to dean and chapter, this act had made it clear and without question. To which Lord Coke subjoins that all defects are remedied by this most excellent act of parliament, the fatal plea to all concealment as to those possessions: adding, that though the case under consideration did only concern the church of Norwich, it would serve as well for many other cathedral churches (*b*).

Dean to visit
the chapter.

The dean ought to visit his chapter (*c*).

And of ancient time, the canons made their confessions to the dean; and Lindwood says, that the canons are under the dean as to the cure of souls (*d*).

Power of dean
and chapter
to remove
cathedral
schoolmaster.

The dean and chapter have been upholden by the temporal court in removing for misconduct a schoolmaster whom they had by their statutes the power to appoint. The case was as follows:—

King Henry VIII. founded by charter the cathedral church of Rochester, to consist of a dean and six prebendaries, and he made certain statutes for their government. By statute 26, a master was to be chosen by the dean and chapter, to teach certain poor boys who, by the same statute, were to be instructed in the cathedral, and the master, if found negligent or unfit, was to be removed. By statute 35, if any officer, of a description including the master, committed a slight offence, he was to be corrected at the discretion of the dean; if a weighty offence, he was to be expelled by those who gave him his admission. By statute 38, the Bishop of Rochester, for the time being, was appointed visitor, to see that the statutes and ordinances were observed, and with full power to convene and interrogate the dean, canons, minor canons, clerks and other officers, on the articles contained in the statutes, and all other things touching the welfare and honour of the cathedral church, to punish ascertained offences according to their degree, and reform them, and to do all things which might seem necessary to the extirpating of vices and which pertained to the office of visitor.

A schoolmaster, appointed under statute 26, published a pamphlet on Cathedral Trusts, accusing the dean and chapter of having misappropriated the cathedral revenues of Rochester

(*b*) *Gibs. p. 184; Dean and Chapter of Norwich's case, 3 Co. p. 76 b.*

(*c*) *God. p. 55.*

(*d*) *God. p. 55; Lind. p. 327.*

to their own benefit and the injury of poor persons entitled to share in them, and imputing to the then bishop, formerly dean of Worcester, that he had been guilty of similar misconduct as dean, and had, as visitor, culpably, and with knowledge of the facts, omitted to correct it in the dean and chapter of Rochester. The dean and chapter removed the schoolmaster from his office for this publication and the reflections upon the dean and chapter and the bishop, therein contained, pronouncing him guilty of a grave offence, and unfit to be continued in the office of schoolmaster. They, however, under counsel's advice, revoked the dismissal, but immediately afterwards cited him to answer before them for the same offence, and they afterwards dismissed him again for the same publication.

A mandamus having issued at the instance of the schoolmaster, the dean and chapter made a return, and the schoolmaster pleaded several pleas. The facts appeared on the record as above stated. The return alleged that the schoolmaster had been removed, to wit, for lawful cause, and had not appealed to the visitor. The schoolmaster pleaded that the bishop had an interest in the cause of removal, which disqualified him from acting as visitor; and by another plea justified the publication, and denied that he was lawfully dismissed. On demurrer to the pleas, it was held,—

(1.) That the bishop (if not interested) was the proper visitor in the case, for that statute 35 did not withdraw it from the general authority given to the visitor by statute 38, and the dean and chapter did not exercise a visitorial authority in dismissing the master.

(2.) That the bishop had not such an interest as disqualified him from acting as visitor.

(3.) That the prosecutor, therefore, should have appealed to the visitor, and not proceeded by mandamus. And that, assuming the dismissal to have been improper, the court was not authorized to interfere on the alleged ground that the dean and chapter were acting in excess of their jurisdiction (e).

Upon the same principles the dean and chapter have power to remove a chorister, subject to an appeal to the visitor.

Power to
remove
chorister.

Thus a mandamus commanding the dean and chapter of a cathedral to restore a chorister, alleged that the office was a freehold in their gift, paid by salary out of their land revenues, and conferring a right to vote on the election of members of parliament, and that the chorister had been wrongfully removed. Return, that, by ordinances of the founder, for the government of the cathedral, it was provided that, if any of the officers of the cathedral, including choristers, commit a small fault, he may be punished by the dean, but that, "if his crime be of a blacker dye (if it be judged equitable), he may be expelled by whom he was admitted," and that the bishop of the diocese

(e) *The Queen v. Dean of Rochester* (1851), 17 Q. B. p. 1.

should be the visitor of the cathedral, to take special care that all its ordinances should be inviolably preserved, to punish and correct all offences committed by officers of the cathedral, and to do all things that are judged lawfully to appertain to the office of visitor. And that the chorister had not appealed to the bishop.

It was held, on demurrer to the return, that mandamus did not lie, as the remedy for the wrongful amotion complained of was by application to the visitor, who had sufficient and exclusive jurisdiction, although the foundation was spiritual and not eleemosynary, and the office was a freehold office, and that it was not necessary to return the cause of amotion (*f*).

Dean may
make a
deputy.

The dean may make a deputy or sub-dean, to exercise the spiritual jurisdiction; yet such deputy cannot charge the possessions of the church, so as to confirm leases, unless it be otherwise provided by the local statutes (*g*).

Sub-dean.

Braithwaite v.
Hook.

There is usually a sub-dean appointed from the canons. But in the cathedral church of Chichester, from a very early period, there has been an officer called the sub-dean, who is not a member of the chapter, and is not inducted into a stall. Except on very rare occasions, the sub-dean has been also vicar of the parish in which the cathedral is locally situated. For many centuries, and until the year 1852, the north transept of the cathedral was used as a church by the parishioners of the same parish, and the churchyard adjoining the cathedral as their place of burial. No church-rate was ever levied upon the parish for the repairs of the north transept, but the whole expense of the maintenance of the north transept and the churchyard was defrayed by the dean and chapter, and the services regulated and controlled by them also. The inhabitants of the precincts of the close maintained their own poor apart from the parish, and held an annual vestry in the south transept of the cathedral to lay a rate for that purpose; and they were not inhabitants of the parish, so as to be presented to the ordinary if they did not receive the sacrament in the parish church at Easter. The vicar and sub-dean kept the registers both of the parish and of the precincts of the close. Before the year 1813 the names of the inhabitants of the parish and of the close were entered promiscuously in the register books of baptisms, marriages, and burials. After 1813 the marriages of inhabitants of the parish and the close were still entered in the same book, but the baptisms and burials were entered in separate books for the parish and for the close. The vicar and sub-dean performed all the ordinary ministerial duties for, and received the usual fees from, the inhabitants of the parish and of the close, and for many years some of the inhabitants of the precincts of the close paid Easter offerings to the vicar and sub-dean. The Court of

(*f*) *The Queen v. The Dean and Chapter of Chester* (1850), 15 Q. B. p. 513.

(*g*) God. p. 55; Wats. c. 44, p. 475; *Evans v. Ascwith*, Noy, p. 93; Palm. p. 460; Latch. pp. 237, 250.

Arches held, that the right conceded to the parish by using the north transept for divine service and the churchyard for burials was only a limited privilege, and the incumbent of the parish had only such rights, as vicar, as were incidental to the privileges conceded, and were limited accordingly; that such rights were extinguished in 1852, when a new church was substituted for the north transept, and in 1854 when the cathedral churchyard was closed for burials by an order in council; that the sub-dean, as distinguished from the vicar, had separate rights and duties, namely, the discharge of spiritual functions within the close, and the ministerial fees arising from the duties so discharged; and that the appointment of sub-dean did not legally incapacitate the dean, when he thought fit, from personally discharging the spiritual duties in respect of the inhabitants of the close.

In the same case it was said that if the foundation of the cathedral and the grant of the adjoining land date before the year 1189, and the institution of civil parishes, it will be presumed that neither the site of the cathedral nor of the precincts are within the limits of any parish; and that an office held by a person called a sub-dean, in a cathedral, but independently of the dean, and not subject to the cathedral authorities, is an anomaly unknown to the law (*h*).

By 28 Hen. 8, c. 11, s. 1, the profits of a deanery during the vacation shall go to the successor towards the payment of his first-fruits.

By 26 Hen. 8, c. 3, s. 22, where the dean or other chief governor of any cathedral or collegiate church, hath a certain portion of the possessions alone limited to his office; and every prebendary, vicar, petty canon, and other minister spiritual hath another portion alone and distinctly limited to his respective office; they shall be rated for their first-fruits separately and not jointly.

Every see or cathedral (as such) is exempt from archidiaconal jurisdiction. Thus a bishop's see having been newly erected within the limits of a certain archdeaconry, it was represented that the archdeacon had presumed to exercise his jurisdiction over the bishop there consecrated and the church; and Gregory IX. decreed thereupon that this should no more be done, but that the bishop should be exempt from the archidiaconal jurisdiction, which decretal epistle became part of the body of the canon law (*i*).

Cathedrals are also exempt from the law requiring a faculty (*k*) before an alteration is made in the fabric, utensils, or ornaments (*l*).

When cathedral close extra-parochial.

Profits of a deanery during vacation.

How the first-fruits of the revenues thereof shall be charged.

Cathedral exempted from archidiaconal jurisdiction.

From law as to faculties.

(*h*) *Braithwaite v. Hook* (before Dr. Lushington, Dean of Arches, November, 1861), 8 Jur. N. S. p. 1186, and Special Report. See p. 125, *supra*.

(*i*) *Gibs*, p. 171; *X. i.* 33, 16.

(*k*) *Vide infra*, Part VI., Chap. II., sect. 6.

(*l*) *Boyd v. Phillpotts*, L. R. 4 Adm. & Eccl. p. 297; *Phillpotts v. Boyd*, L. R. 6 P. C. p. 435.

Cathedral, the parish church of the whole diocese.

The cathedral church is the parish church of the whole diocese (which diocese was therefore commonly called *parochia* in ancient times, till the application of this name to the lesser branches into which it was divided made it for distinction's sake to be called only by the name of diocese): and it has been affirmed, with great probability, that if one resort to the cathedral church to hear divine service, it is a resorting to the parish church, within the natural sense and meaning of the statute (*m*).

Upon which account it is ordained by a canon of Simon Mepham, Archbishop of Canterbury, that in certain cases, they who cannot be cited personally, nor in their dwelling-house, may be cited in their parish church; and if they have no parish church, or that does not appear, then they shall be cited in the cathedral (*n*).

And by Canon 65 of 1603: Excommunicates shall be denounced every six months, as well in the parish church, as in the cathedral church of the diocese.

Synodals.

In honour of the cathedral church, and in token of subjection to it, as the bishop's see, every parochial minister within the diocese paid to the bishop an annual pension, called anciently *cathedraticum*. This acknowledgment is supposed to have taken rise from the establishment of distinct parishes, with certain revenues, and thereby the separating of those districts from the immediate relation they had borne to the cathedral church. By a canon of the council of Bracara, this pension is called *honor cathedræ episcopalis*, and restrained (if it was not limited before) to two shillings each church: which canon became afterwards part of the canon law of the church, with this gloss upon the words two shillings (viz., at most; for sometimes less is given); and has been received in England, as in other churches, under the name of *synodaticum*, or synodals, because formerly paid at the bishop's synod at Easter (*o*). It seems, however, that in cases where the estates of bishops have vested in the ecclesiastical commissioners under 23 & 24 Vict. c. 124, synodals having become payable to the commissioners have practically been remitted in law.

Bishop's residence at cathedral.

Bishops shall be at their cathedrals, on some of the greater feasts, and at least in some part of Lent (*p*).

Bishops shall reside at their cathedral churches, and officiate there on the chief festivals, on the Lord's days, and in Lent, and in Advent (*q*).

Dean and chapter's residence there.

By Canon 42 of 1603, "Every dean, master, or warden, or chief governor of any cathedral or collegiate church, shall be resident there fourscore and ten days, *conjunctim* or *divisim*, in every year at the least, and then shall continue there in preaching the word of God and keeping good hospitality; except he

(*m*) Gibs. p. 171.

(*n*) Gibs. p. 1003.

(*o*) Gibs. p. 171.

(*p*) Lind. p. 130.

(*q*) Otho. Athon, p. 55; et vide supra, p. 53.

shall be otherwise let with weighty and urgent causes to be approved by the bishop of the diocese, or in any other lawful sort dispensed with. And when he is resident, he with the rest of the canons or prebendaries resident shall take special care that the statutes and laudable customs of their church (not being contrary to the work of God or prerogative royal), the statutes of this realm being in force concerning ecclesiastical order, and all other constitutions now set forth and confirmed by his majesty's authority, and such as shall be lawfully enjoined by the bishop of the diocese in his visitation according to the statutes and customs of the same church or the ecclesiastical laws of this realm, be diligently observed; and that the petty canons, vicars-choral, and other ministers of their church, be urged to the study of the Holy Scriptures; and every one of them to have the New Testament not only in English, but also in Latin" (r).

By Canon 44, "No prebendaries nor canons in cathedral or collegiate churches having one or more benefices with cure (and not being residentiaries in the same cathedral or collegiate churches), shall, under colour of their said prebends, absent themselves from their said benefices with cure above the space of one month in the year, unless it be for some urgent cause, and certain time to be allowed by the bishop of the diocese. And such of the said canons and prebendaries, as by the ordinances of the cathedral or collegiate churches do stand bound to be resident in the same, shall so among themselves sort and proportion the times of the year, concerning residency to be kept in the said churches, as that some of them always shall be personally resident there; and that all those who be or shall be residentiaries in any cathedral or collegiate church, shall, after the days of their residency appointed by their local statutes or customs expired, presently repair to their benefices, or some one of them, or to some other charge where the law requireth their presence, there to discharge their duties according to the laws in that case provided. And the bishop of the diocese shall see the same to be duly performed and put in execution."

By Canon 24, "In all cathedral and collegiate churches, the Holy Communion shall be administered upon principal feast days, sometimes by the bishop (if he be present), and sometimes by the dean, and sometimes by a canon or prebendary: the principal minister using a decent cope, and being assisted with the gospeller and epistler agreeably according to the Advertisements, published anno 7 Eliz. The said Communion to be administered at such times, and with such limitation, as is specified in the Book of Common Prayer. Provided that no such limitation by any construction shall be allowed of, but that all deans, wardens, masters, or heads of cathedral and collegiate churches, prebendaries, canons, vicars, petty canons,

Administra-
tion of the
Holy Com-
munion there.

Vestments to
be worn.

(r) See now 3 & 4 Vict. c. 113, s. 3, *infra*, sect. 3.

singing men, and all others of the foundation, shall receive the Communion four times yearly at the least."

By Canon 25, "In the time of Divine Service and prayers in all cathedral and collegiate churches, when there is no Communion, it shall be sufficient to wear surplices; saving that all deans, masters, and heads of collegiate churches, canons, and prebendaries, being graduates, shall daily, at the times both of prayer and preaching, wear with their surplices such hoods as are agreeable to their degrees."

The Advertisements published in the seventh year of Queen Elizabeth, and referred to in Canon 24 foregoing, are as follows: "Item, In the ministration of the Holy Communion in cathedral and collegiate churches, the principal minister shall use a cope, with gospeller and epistler agreeably; and at all other prayers to be said at the Communion table, to use no copes but surplices." "Item, That the dean and prebendaries wear a surplice, with a silk hood, in the quire; and when they preach in the cathedral or collegiate church, to wear a hood" (s).

By the rubric at the end of the first prayer book of Edward the Sixth, it is ordered, that "in all cathedral churches and colleges, the archdeacons, deans, provosts, masters, prebendaries, and fellows, being graduates, may use in the quire, besides their surplices, such hoods as pertain to their several degrees, which they have taken in any university within this realm."

Preaching.

By Canon 43, "The dean, master, warden, or chief governor, prebendaries, and canons in every cathedral and collegiate church, shall not only preach there in their own persons, so often as they are bound by law, statute, ordinance, or custom; but shall likewise preach in other churches of the same diocese where they are resident, and especially in those places whence they or their church receive any yearly rents or profits; and in case they themselves be sick, or lawfully absent, they shall substitute such licensed preachers to supply their turns, as by the bishop of the diocese shall be thought meet to preach in cathedral churches. And if any otherwise neglect or omit to supply his course, the offender shall be punished by the bishop, or by him or them to whom the jurisdiction of that church appertains, according to the quality of the offence."

And by Canon 51, "The deans, presidents, and residentiaries of any cathedral or collegiate church, shall suffer no stranger to preach unto the people in their churches, except they be allowed by the archbishop of the province, or by the bishop of the same diocese, or by either of the universities. And if any in his sermon shall publish any doctrine either strange, or disagreeing from the Word of God, or from any of the Articles of Religion agreed upon in the Convocation House anno 1562,

(s) See *Hebbert v. Purchas*, L. R. 3 P. C. at p. 649; *Ridsdale v. Clifton*,

2 P. D. at p. 316; in which it was said that these Advertisements con-

or from the Book of Common Prayer; the dean or the residents shall by their letters, subscribed with some of their hands that heard him, so soon as may be, give notice of the same to the bishop of the diocese, that he may determine the matter, and take such order therein as he shall think convenient."

By 14 Car. 2, c. 4, s. 16, A lecturer being chosen in a cathedral or collegiate church, need not to read the Common Prayer, as other persons admitted to ecclesiastical offices; but it shall be sufficient openly to declare his assent and consent to all things therein contained.

Concerning the cathedral churches of the new foundation, it was enacted by 31 Hen. 8, c. 9, that the king should have power to declare and nominate by letters patent or other writing under the great seal, such number of bishops, such number of cities (sees for bishops), cathedral churches, and dioceses, by metes and bounds, as shall appertain; and (out of the revenues of the dissolved monasteries) to endow them, with such possessions, after such manner and condition, as he shall think necessary and convenient.

Cathedrals of the new foundation.

And it appears by a scheme for new cathedrals and bishoprics, under the hand of King Henry VIII., that his design was, to erect many more (pursuant to the powers given by this act) than were erected (*x*).

A chapter of a cathedral church consists of persons ecclesiastical, canons and prebendaries, whereof the dean is chief, all subordinate to the bishop, to whom they are as assistants in matters relating to the church, for the better ordering and disposing the things thereof, and for confirmation of such leases of the temporalities and offices relating to the bishopric as the bishop from time to time shall happen to make (*y*).

Chapter, what.

Of these chapters, some are ancient, some new; the new are those which are founded or translated by King Henry VIII. in the places of abbots and convents, or priors and convents, which were chapters whilst they stood, and these are new chapters to old bishoprics; or they are those which are annexed unto the new bishoprics founded by King Henry VIII., and are therefore new chapters to new bishoprics (*z*).

There are now those which are newer still, being constituted for the new bishoprics erected in the reign of Queen Victoria.

The chapter in a collegiate church is more properly called a college, where, as at Westminster or Windsor, there is no episcopal see (*a*).

There may be a chapter without any dean, as was the chapter of the collegiate church of Southwell; and grants by or to

Chapter without a dean.

tained the law as to the vestments to be worn in cathedral and collegiate churches. Et vide infra, Part III., Chap. XI., sect. 5.

(*x*) Burnet, Hist. Reform. vol. i.

p. 526.

(*y*) God. p. 58; 2 Roll. p. 451; Bunb. p. 209. Vide supra, p. 123.

(*z*) 1 Inst. p. 95 a; Dyer, p. 273 b.

(*a*) Wood, b. i. c. 3.

such a chapter are as effectual as other grants by dean and chapter (*b*).

In the cathedral churches of St. David's and Llandaff there never was till recent statutes any dean, but the bishop in either was head of the chapter; and at the former, the chantor, at the latter, the archdeacon presided, in the absence of the bishop or vacancy of the see (*c*).

In some places, two chapters.

One bishop may possibly have two chapters, and that by union or consolidation; and it seems that if a bishop has two chapters, both must confirm his leases (*d*).

Capacity to take or purchase.

A chapter of itself is not capable to take by purchase or gift, without the dean, who is the head of it. This was agreed in *Eire's case* (*e*); but whereas in the lease there mentioned (made by the Archbishop of York) of a field in Battersea, one article was, that during the vacancy of the archbishopric, the rent should be paid to the chapter of York, as in their own proper right; upon a question raised, whether a chapter could receive the rent, it was agreed that they could, because they are persons of which the law takes notice, and to whom therefore such payment might be made; and though it should appear afterwards that they could not receive it in their own proper right, that defect would not hinder the payment (*f*).

Difference between prebend and prebendary.

The books do generally confound the two words prebend and prebendary, whereas the former signifies the office, or the stipend annexed to that office, and the latter signifies the officer, or person who executes the office and enjoys such stipend.

Prebendary, whence so called.

Lord Coke says, a prebendary was so called a *præbendo*, from the assistance he affords to the bishop, whereas he had his name, on the contrary, from the assistance which the church affords him, in meat, drink, and other necessities (*g*).

Prebend, what.

A prebend is an endowment in land or pension in money given to a cathedral or conventual church in *præbendam*, that is, for a maintenance of a secular priest or regular canon, who was a prebendary, as supported by the said prebend (*h*).

Canonry.

A canonry also is a name of office, and a canon is the officer in like manner as a prebendary, and a prebend is the maintenance or stipend both of the one and of the other (*i*).

Two kinds of prebendaries.

Prebendaries are distinguished into those which are called simple and dignitary. A simple prebendary is such who has no cure, and who has no more but his revenue for his support; and a dignitary prebendary has always a jurisdiction annexed, and for this reason he is called a dignitary, and his jurisdiction is gained by prescription (*k*). A prebendary has two capacities,

(*b*) Wats. c. 38, p. 377; 1 Mod. p. 204; 2 Roll. p. 453.

(*c*) Johns. p. 60.

(*d*) God. p. 58; Dyer, p. 282 b.

(*e*) Mo. p. 51; *Lyn v. Wyn*, Bridg. (Sir O.) p. 148.

(*f*) Gibs. p. 174; Mo. p. 51.

(*g*) Gibs. p. 172; 3 Co. p. 75 b.

(*h*) Ken. Paroch. Ant. Glossary.

(*i*) Gibs. p. 172; Dyer, p. 294.

(*k*) Nels. p. 468.

sole and aggregate : for he is a member of a corporation aggregate, and has a sole capacity in respect of his fellowship (*l*).

Of common right the bishop is patron of all the prebends, because the possessions were derived from him (*m*).

Prebendary,
how appointed.

And in such case he prefers to them by collation, which is the same thing with institution, saving that no presentation is made ; but if a prebend be in the gift of a layman, the patron presents to the bishop, who institutes in like manner as to another benefice (*n*) ; and then the dean and chapter do induct them, that is, after some ceremonies, place them in a stall in the cathedral church to which they belong, whereby they are said to have a place in the choir (*o*).

In the case of *Clarke v. Bishop of Sarum*, a mandamus was granted to admit the plaintiff to a canonry or prebend of Sarum, and to institute, induct and invest him therein, though it was strongly opposed on the rule to show cause, as turning the common law remedy by *quare impedit* into another channel. The writ was ordered, but never issued, the parties agreeing to refer the dispute (*p*).

Prebends are some of them donative. At Westminster, the king collates by patent, and, by virtue thereof, the prebendary takes possession without institution or induction (*q*).

No person may hold more than one prebend in the same church, and this is agreeable to the rule of the ancient canon law (*r*).

None to have
two prebends
in one church.

So if a prebendary accepts of a deanery, his prebend is void by cession ; so if he is made a bishop, the king presents to his prebend (*s*).

But the acceptance of a deanery must be understood to be in the same church ; therefore in 11 Edw. 3, the bishop of Durham having presented a clerk to a prebend of the church of St. Andrew, and afterwards the same person being presented to a deanery in that church, it was held that the king should recover the presentation to this prebend, because one and the same person cannot possess two prebends in one and the same church (*t*) ; but then it must be understood of a prebendary who is a complete member of the chapter, that is, one who has a place in the choir, and a vote in the chapter ; for an archdeacon may be either a dean or prebendary of that church where he is archdeacon, because as such he has no vote in the chapter (*u*).

(*l*) Ayl. Oxford, vol. ii. p. 23. Serjeant Hill's MSS. notes.

(*m*) God. p. 52 ; 3 Co. p. 75 b ; Bac. Ab. vol. 4, p. 743.

(*n*) *Salé v. Bishop of Coventry*, 1 Anders. p. 241.

(*o*) Wats. c. 15, 169.

(*p*) 2 Stra. p. 1082. This case has been denied to be law : *Powel v. Milbank*, 1 T. R. 401. But a mandamus will be granted to compel

an election when a vacancy has occurred : *Bp. of Chichester v. Harvard*, 1 T. R. p. 652 ; 1 Wils. p. 206.

(*q*) Johns. p. 60 ; Wats. c. 15, p. 170.

(*r*) Gibs. p. 174 ; Clem. iii. 2, 6 ; X. iii. 8, 9.

(*s*) Nels. p. 469.

(*t*) Dyer, p. 273 a.

(*u*) Nels. p. 469.

Whether a
prebend is a
lay-fee.

Formerly, a layman (Dr. Watson says) might have taken a title to a prebend (*x*); but now by the Act of Uniformity, 14 Car. 2, c. 4, no person is capable of being admitted to any ecclesiastical promotion, who is not in priest's orders (*y*).

The Regius Professor of Civil Law, at Oxford, formerly had the prebend of Shipton, in the cathedral of Salisbury. He was also lay rector of Shipton (*z*).

Separate
possession.

The possessions of the dean and chapter are for the most part divided; the dean having one part alone in right of his deanery, and each particular prebendary a certain part in right of their prebends; the residue the dean and chapter have alike; and each of them is to this purpose incorporate by himself (*a*).

For a prebendary, who has a distinct estate, and has also a vote in the chapter, is a corporation sole in respect of the one, and at the same time is a member of a corporation aggregate in respect of the other (*b*).

But no canon has a separate freehold in the corporate lands of the dean and chapter (*c*).

Quare impedit
to be brought
in the county
where the
cathedral is.

If the cathedral church be in one county, and the corps (body, or estate) of the prebend be in another county; a writ of *quare impedit* shall be brought in the county of the cathedral, where the office, or the foundation of the right to the corps, is, and not in that where the corps lies (*d*).

Land tax.

By 38 Geo. 3, c. 5, s. 102, now repealed, provision was made for some relief to residentiary canons in cathedrals in respect of land tax.

Prebend a
sinecure.

It does not appear that canons or prebendaries have cure of souls in any respect; they are indeed for the most part instituted, but not to the cure of souls (*e*).

So that a prebend and a parochial benefice are not incompatible; but both might under the old law be holden together, without any dispensation. And a prebend was excepted from the operation of the now repealed statute 21 Hen. 8, c. 13, against pluralities, by the proviso of sect. 31 (*f*).

And for the same reason, he who takes a title to a prebend, was not thereby obliged by 13 Eliz. c. 12, to subscribe or read the Thirty-nine Articles; but otherwise, he must take the same oaths, and make and subscribe the same declarations, as other persons qualifying for ecclesiastical offices.

Charge upon a
canonry legal.

In *Grenfell v. The Dean, &c. of Windsor* (*g*), a canon of Windsor had granted the canonry and the profits, &c., to the plaintiffs, to secure a sum of money. So far as it appeared on

(*x*) So ruled in *Bland v. Maddox*, Cro. Eliz. p. 79.

(*y*) Wats. c. 14, p. 141.

(*z*) The first Dr. Phillimore was the last layman who held these offices.

(*a*) God. p. 52; F. N. B. p. 195.

(*b*) Johns. p. 67.

(*c*) *Harris v. Phillips*, 1 Q. B. 1891, p. 267.

(*d*) Gibs. p. 174; Dyer, p. 194 a.

(*e*) Johns. p. 86.

(*f*) Johns. p. 91. Vide infra, Part IV., Chap. IV., sect. 6, for the present law as to pluralities.

(*g*) 2 Beav. p. 544.

an interlocutory application, the estates were vested in the corporation, and the canon was entitled to an aliquot share of the profits. There was no cure of souls, and the only duties were residence within the castle, and attendance in the chapel twenty-one days a-year. It was holden, upon this state of circumstances, that the security was valid, and a receiver of the profits was appointed. It was said not to fall under the principles of public policy, on which the income of a benefice, pay, pensions, &c., are holden inalienable.

Dr. Godolphin says, that after the death of a prebendary, the dean and chapter shall have the profits (*h*).

Profits of a
prebend
during
vacation.

But by the statute of 28 Hen. 8, c. 11, the profits of a prebend, during the vacation, shall go to the successor, towards the payment of his first-fruits.

In order to reconcile which, perhaps, the distinction may be this: that the issues of those possessions which he has in common with the rest of the chapter, shall after his death be divided among the surviving members of the chapter; but the profits of those possessions which he has in his separate capacity, as a sole corporation of himself, shall be and enure to his successor (*i*).

And so it was decided that no part of the revenue of the cathedral church of Canterbury is allowed to any prebend in particular, except the annual stipend of 17*l.* 6*s.* 8*d.*; which by the 16th chapter of the statutes is to be paid to every prebendary *pro corpore prebende sue*. The residue of the revenue is the joint property of the dean and chapter, as being an aggregate body; and no member has a right to any part thereof before it is divided into shares (*k*).

A prebendary leaving a house by death or cession out of repair, he or his executors shall be liable to a suit of dilapidations, though it was not annexed to the prebendal stall. This was declared in the Court of King's Bench, in the case of Dr. Sands against the executors of his predecessor, residentiary prebendary in the cathedral of Wells, where the bishop appoints to each prebendary what house he thinks fit. For although the house is not parcel of any particular prebend, it must be assigned to some particular prebend, and when it is so assigned it is part of the prebend, and shall be liable to a suit for dilapidations. Wherefore in that case the court refused to grant a prohibition (*l*).

Dilapidations
of prebendal
houses.

In a case from the cathedral of Ely, it was decided that an action on the case for dilapidations of a prebendal house, may be maintained at common law by a succeeding prebendary against his predecessor who had resigned. But as it appeared by the

(*h*) God. p. 52.

(*i*) See *Rennell v. Bp. of Lincoln*, 7 B. & C. p. 113; *Mirehouse v. Rennell*, 8 Bing. p. 490.

(*k*) *Young v. Lynch*, Sayer, p. 86. See *Rex v. Episcopum Dunelmensem*, 1 Burr. p. 567.

(*l*) *Gibs*, p. 174; *Dr. Sand's case*, Skin. p. 121.

statute that the receiver of the chapter ought to require the prebendaries to repair their houses, furnishing the necessary materials from the funds of the church, and he had neglected to do this, the plaintiff recovered from his predecessor only the expense of workmanship, the court being of opinion that the materials ought to be furnished him by the church (*m*).

Deans and canons are not included in the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43).

Residence houses.

The law as to residence houses of deans and canons is given below in sect. 3 of this Chapter, and in Part V., Chapter II., sect. 3.

Estates.

Further provisions as to their estates and emoluments, and as to those of the minor cathedral officers and corporations, will be found in the chapter on "Dilapidations," Part V., Chap. V.; that on letting and alienation, Chap. VI.; and that on the ecclesiastical commissioners, Part IX., Chap. III.

Civil jurisdiction in precincts.

The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 253, especially saves and preserves any jurisdiction exercised over the precinct or close of any cathedral which may still be exercised concurrently with that of the borough justices.

Dependence on the bishop.

By degrees the dependence of the dean and chapter on the bishop, and their relation to him, grew less and less; till at last the bishop has little more left to him than the power of visiting them, and that very much limited (*n*).

Nevertheless, the dean and chapter may not alter the ancient and approved usages of their church, without consent of the bishop; and if they do, such innovations are declared void by the canon law (*o*).

Making of statutes.

A statute made by a dean and chapter to bind their successors, and not themselves, is void, and so declared by the canon law; forasmuch as it is not equitable that a man should lay that burden upon another, which he will not bear himself (*p*).

Grants made to them.

It seems that at the common law, by the gift or grant of lands to the dean and chapter, as a corporation aggregate, the inheritance or fee simple may pass to them without the word successors; because, in construction of law, such body politic is said never to die (*q*).

The extent to which deans and chapters are guardians of the spiritualities, has been treated of in the chapter on bishops (*r*).

Presentation of one of their own body to a benefice.

Under the old law Dr. Watson said, if a corporation do present their head, as if the dean and chapter do present the dean to a benefice, it is void; but if they present one of their prebendaries it is good (*s*).

(*m*) *Radcliff v. D'Oyley*, 2 T. R. p. 630. As to a vicar-choral, vide *infra*, p. 143.

(*n*) *Johns*, p. 59; *Roll. Abr.* p. 229; *Rex v. Episcopum Dunelmensem*, 1 Burr. p. 567.

(*o*) *Gibs*, p. 174.

(*p*) *Garnett v. Gordon*, 1 M. & S. p. 205.

(*q*) *God.* p. 58.

(*r*) *Vide supra*, pp. 62, 63.

(*s*) *Wats.* c. 20, p. 222; 1 Kyd on

The surrender of the lands and possessions of a dean and chapter does not dissolve the corporation. This was declared in the case of the dean and chapter of Norwich, who having conveyed their lands to King Edward VI., and being incorporated anew, and their lands regranted, made a lease by their old name; and it was adjudged to be a good lease, because notwithstanding the said conveyance of the lands, the old corporation of King Henry VIII. remained. The reason of which was, that the two principal ends, for which deans and chapters were instituted (the first to advise the bishop in spiritualities, the second to restrain him in temporalities), might well be answered by them, though they had no temporal possessions (*t*).

Why the surrender of their lands does not dissolve the corporation.

So, if the corps of a prebend is a manor, and no more, if the manor is recovered from him by title paramount, notwithstanding such recovery, the person remains a prebendary of the church, because he has a stall in the choir and a voice in the chapter (*u*).

Among the minor officers of every cathedral there are persons whose duty it is to assist in the services of the cathedral, who are generally divided into the two classes of petty or minor canons, in the Cathedrals of the New, and vicars-choral or priest-vicars in the Cathedrals of the Old, Foundation.

Vicars-choral.

By Canon 42 of 1603, as already stated, every dean of a cathedral or collegiate church shall take special care that "the petty canons, vicars-choral, and other ministers of their church be urged to the study of the Holy Scriptures; and every one of them to have the New Testament not only in English but also in Latin."

And by Canon 24, "vicars, petty canons, singing-men, and all others of the foundation shall receive the Communion four times yearly at the least."

Their offices are by sect. 124 of 1 & 2 Vict. c. 106, included within the meaning of "cathedral preferment," and are further referred to in the second section of this chapter.

With respect to vicars-choral, the Common Pleas have decided that a vicar-choral of the cathedral church of Wells is a corporation sole, and that his personal representative is liable to an action at the suit of his successor in the vicarage, for dilapidations of the house held by him as such vicar-choral. And, even if he were not strictly a corporation sole, *semble*, per Erle, C. J., that he still has such a sole estate in such house as to create the liability (*x*).

Dilapidations by vicars-choral.

The same tribunal has decided that a vicar-choral of St. Paul's Cathedral is not entitled during his year of probation to share in a fine paid on the renewal of a lease by the dean and chapter and vicars-choral, of an estate which is one of the sources of

As to emoluments of vicar-choral.

Corporations, p. 180. *Heckar's case*, Brooke, Abr. Corporations. Vide infra, Chap. XI., sect. 4.

p. 73; vide supra, p. 123.

(*u*) 3 Co. p. 75.

(*x*) *Gleaves v. Parfitt*, 7 C. B. N. S.

p. 838.

(*t*) Gibbs, pp. 173, 174; *Dean and Chapter of Norwich's case*, 3 Co.

the emoluments enjoyed by such vicars-choral. Had he been entitled, money had and received would, it seems, have been the proper form of action to recover it, either against all the other vicars-choral, or against the pittance, the person intrusted with the collection and distribution of the funds (y).

Deans and chapters of the new foundation. Their local statutes.

There have been at various periods many disputes concerning the deans and chapters of the new foundation, which do not appear as yet to have received a full and final determination, particularly with regard to the validity of their local statutes; and then (supposing their validity) with regard also to the construction of those statutes themselves in divers instances.

Periods to be considered.

These periods must be considered from the first erection of the said deaneries and chapters, in pursuance of the act of the 31 Hen. 8; from the first year of Queen Mary to the first year of Queen Elizabeth; from the first year of Queen Elizabeth to the sixth year of Queen Anne; and from the sixth year of Queen Anne to the present time.

31 Hen. 8, c. 9. Power of foundation given to the king.

(1.) By 31 Hen. 8, c. 9, the power of foundation and erection was given to the king as follows: "His highness shall have full power . . . to declare and nominate, by his letters patent or other writings to be made under his great seal, such number of bishops, such number of cities, sees for bishops, cathedral churches and dioceses, by metes and bounds, for the exercise and ministration of their episcopal offices and administration, as shall appertain; and to endow them with such possessions, after such manner, form and condition, as to him shall be thought necessary and convenient; and also shall have power . . . to make and devise translations, ordinances, rules and statutes, concerning them all and every of them, and further to do all and every other thing . . . which he shall think requisite for the good perfection and accomplishment of his said most godly and gracious purposes touching the premises, or any other charitable or godly deeds to be devised by him concerning the same; and that all and singular such translations, nominations of bishops, cities, sees, and limitations of dioceses for bishops, erections, establishments, foundations, ordinances, statutes, rules, and all other things which shall be devised, comprised, and expressed by his Grace's sundry and several letters patent, or other writings under his great seal, touching and concerning the premises, or any of them, or any circumstances or dependencies thereof, necessary and requisite for the perfection of the premises, or any of them, or any circumstances or dependencies thereto necessary and requisite for the perfection of the premises or any of them, shall be of as good . . . effect to all intents and purposes, as if such things that shall be so desired, expressed, and mentioned in his letters patent or other writings under his great seal had been done, made and had by authority of parliament."

In pursuance of this power, the king did erect the several sees, deaneries and churches before mentioned; and in the charters of their foundation, with respect to the matters before us, did ordain as follows: “Rex omnibus ad quos, &c. salutem. Cum nuper cenobium quoddam seu domus regularium canonicorum, quod, dum extitit, prioratus, seu domus canonicorum regularium beatæ Mariæ virginis Carliolensis vulgo vocabatur, atque omnia et singula ejus maneria, dominia, messuagia, terræ, tenementa, hæreditamenta, dotationes et possessiones certis de causis specialibus et urgentibus per Lancelotum ipsius nuper cenobii sive domus canonicorum regularium priorem et ejusdem loci conventum, nobis et hæredibus nostris imperpetuum jam data fuerunt et concessa, prout per ipsorum prioris et conventus cartam sigillo suo communi sive conventus sigillatam, et in cancellaria nostra irrotulatum manifeste liquet: — Nos — quandam ecclesiam cathedralem, de uno decano presbytero, et quatuor presbyteris præbendariis ibidem, omnipotenti Deo omnino et in perpetuum servituris creari, erigi, fundari et stabiliri decrevimus; et eandem ecclesiam cathedralem, de uno decano presbytero, et quatuor præbendariis presbyteris, cum aliis ministris ad divinum cultum necessariis, tenore præsentium, realiter et ad plenum creamus, erigimus, &c. — Volumus etiam et ordinamus, quod prædicti decanus et quatuor præbendarii, se gerent, exhibebunt, et occupabunt, juxta et secundum ordinationes, regulas, et statuta eis per nos in quadam Indentura, in posterum fienda, specificanda, et declaranda.—Et quod præfati decanus et præbendarii ecclesiæ cathedralis prædictæ et successores sui sint, et in perpetuum erunt, capitulum episcopatus Carliolensis, sitque idem capitulum Roberto nunc Carliolensi episcopo, et successoribus suis episcopis Carliolensibus perpetuis futuris temporibus annexum, incorporatum, et unitum — Volumus etiam, et per præsentis concedimus, præfato decano et capitulo dictæ ecclesiæ cathedralis sanctæ et individue Trinitatis Carliolensis, et successoribus suis, quod decanus ecclesiæ cathedralis illius pro tempore existens, omnes et singulos ejusdem ecclesiæ cathedralis inferiores officiaros et ministros, ac alias prædictæ ecclesiæ cathedralis sanctæ et individue Trinitatis Carliolensis quascunque personas, prout casus seu causa exiget, faciet, constituet, admittet, et acceptabit, de tempore in tempus in perpetuum; et eos et eorum quemlibet sic admissos, vel admissum, ob causam legitimam corrigere, deponere, et etiam ab eadem ecclesiâ cathedrali amovere et expellere possit et valeat. Salvis nobis, hæredibus et successoribus nostris, titulo, jure, et auctoritate, decanum, præbendarios, et omnes pauperes, ex liberalitate nostra ibidem viventes, de tempore in tempus nominandi, assignandi et præficiendi, qualitercunque et quotiescunque ecclesia cathedralis prædicta decano, præbendariis vel pauperibus prædictis, vel eorum aliquo, per mortem vel aliter vacare contigerit. — Teste rege, &c.”

All the other foundation charters are of the like form; but

During the
reign of
Henry VIII.

that of Carlisle in particular is here recited, because upon this charter did arise the contests which occasioned the act of 6 Ann. c. 75 (hereafter following) to be made.

In the meantime, what is to be observed at present is, that by the above recited act of 31 Hen. 8, c. 9, the ordinances, rules and statutes to be given by the king to the new foundations, were to be under the great seal; and by the above recited charter of foundation they were also to be specified in a certain indenture by the king then after to be made.

Now the king did, by his commissioners appointed for that purpose, institute ordinances, rules, and statutes for the said new foundations; which were delivered to them signed by the said commissioners, but not under the great seal, nor indented. And it is recited in the commission afterwards issued by King Philip and Queen Mary for revising the said statutes (z), that they were only given to the several churches by way of trial or probation, as being intended afterwards to be perfected and delivered in form under the great seal, and indented, if the same had not been prevented by the king's death.

And there seems to be some foundation for this surmise; for the statutes do not conclude in the usual form of letters patent under the great seal, but end with the subscription of the commissioners; and in fact some of the statutes were not given until a little before the king's death: as particularly the statutes of the church of Carlisle, which bear date the sixth day of June, in the thirty-seventh year of his reign, when the king was very infirm, and he died in the January following.

During the
reign of
Queen Mary.

(2.) But whatever might be the cause, upon this foundation only did these statutes subsist at the end of the reign of King Henry VIII., and during the reign of King Edward VI.

In the beginning of the next reign, by the act of 1 Mar. sess. 3, c. 9, the act 31 Hen. 8, c. 9 is recited, and it is further recited that the king "granted unto the several corporations and bodies corporate of every of the said churches, that they should be ruled and governed for ever according to certain ordinances, rules and statutes, to be specified in certain indentures then after to be made by his highness, and to be delivered and declared to every of the bodies corporate of the said several churches, as by the several erections and foundations of the said churches more plainly it doth and may appear: since which said erections and foundations, the said late king did cause to be delivered to every of the said churches so as aforesaid erected and incorporated by certain commissioners by his highness appointed, divers and sundry statutes and ordinances, made and declared by the same commissioners, for the order, rule and governance of the said several churches, and of the deans, prebendaries and ministers of the same; which said statutes and ordinances were made by the said commissioners,

(z) Vide infra, p. 147.

and delivered to every of the said corporations of the said several churches in writing, but not indented according to the form of the said foundations and erections; by reason whereof, the said churches, and the several deans, prebendaries, and ministers of the same, have no statutes or ordinances of any force or authority, whereby they shall be ruled and governed: And forasmuch as the authority of making the said statutes, ordinances and orders was reserved only to the said king, and no mention made of any like authority to be reserved unto his heirs and successors, the same orders and statutes cannot now be made and provided without authority of parliament." It is therefore enacted, that the queen shall, during her natural life, "have full power and authority to make and prescribe to every of the said churches, and the deans, prebendaries, and ministers of the same, and to their successors, such statutes, ordinances, and orders, for the governance, rule, and order of every of the same churches, deans, prebendaries, and ministers of the same, and of the lands, manors, tenements, and possessions of every of the same churches, as shall seem good to her highness, the same statutes and ordinances to be made by her highness in writing, sealed with the great seal of England, and to be delivered to the deans, prebendaries and ministers of every of the said churches for the time being." And it is also enacted that she "shall during her natural life have power by writing sealed with the great seal of England, to alter, transpose, change, augment or diminish the said orders, statutes and ordinances of every of the said churches, as occasion shall serve and as to her shall seem good; and also shall have power to establish statutes, ordinances and foundations, for the good order and government of such grammar schools as have been erected, founded or established by King Henry VIII., or King Edward VI."

In pursuance of this act, King Philip and Queen Mary issued their commission to the effect following: "Philippus et Maria, reverendis in Christi patribus, &c. salutem. Cum illustrissimus princeps et pater noster Henricus octavus collegium sive ecclesiam cathedralem Christi et beatæ Mariæ virginis Dunelmensis erexit et instituit, ac eandem ad ministrorum ejus sustentationem prædiis aliisque proventibus munifice dotavit; nec potuit, ex hac vita discedens, eandem legibus ac statutis convenientibus magnoque sigillo suo Angliæ signatis, firmiter stabilire: Idcirco nos et institutione ac voluntate patris nostri, et decreto senatus nostri (quem parlamentum vocamus) auctoritatem habentes imperfecta absolvendi; et operi ab eodem inchoato fastigium imponendi, vobis potestatem facimus statuta ad eandem ecclesiam cathedralem Dunelmensem preclare regendam, et ministris ejusdem pro tempore experienda et exercenda ante aliquot annos patris nostri nomine tradita, pervidendi, examinandi, mutandi, et pro arbitrio corrigendi, approbandi, plura si opus fuerit addendi, et (si quid ambigui aut obscuri in eisdem inveniantur) explanandi atque expediendi, et tandem, in eam formam

redigendi, quæ ad illius ecclesiæ cathedralis Dunelmensis ministrorumque ejus rectam et quietam moderationem, et ad virtutis et pietatis assiduum exercitium, vestræ prudentiæ maxime necessaria videbitur."

By virtue of which commission, the present statutes of the church of Durham were drawn up and signed; after which Philip and Mary annexed to them this form of confirmation: "Statuta prædicta in hoc volumine contenta, nostra facimus; eisque robur et auctoritatem nostram, quam ex decreto parliamenti anno primo regni nostri edito habemus, impertimur; et magni sigilli nostri appensione confirmamus; ac pro veris et indubitatis ecclesiæ cathedralis Christi et Mariæ virginis Dunelmensis statutis haberi volumus, &c." Which statutes are the same with the former statutes of King Henry VIII., save only that the oath of the king's supremacy is left out; so that what the queen intended seems only to have been, to undo what had been done against the papal supremacy.

In the act 1 Mar., sess. 3, c. 9, it is only recited, that King Henry the Eighth's statutes were not indented, but in this commission it is also specified that they were not under the great seal.

The very act of 31 Hen. 8, c. 9, which is the foundation of the whole, was afterwards repealed, by 1 & 2 Phil. & Mar. c. 8, s. 18, only with a proviso at sect. 26, that the foundations nevertheless should continue. It does not appear that the Queen gave statutes to any but the church of Durham aforesaid. In the last year of her reign we find this direction given by Cardinal Pole, Archbishop, at the opening of the convocation, "Deinde voluit reverendissimus statuta ecclesiarum noviter erectarum aut mutatarum a regularibus ad seculares, expendi per episcopos Lincolnensem, Cicestriensem, &c. et quæ consideranda sunt, referri reverendissimo quam primum commode poterunt." But the queen died, and nothing further was done.

During the
reign of Queen
Elizabeth.

(3.) Upon Queen Elizabeth's accession, the like power was given to her during her natural life, by 1 Eliz. c. 22 (which act was not printed until the year 1707, when the disputes happened that caused the act of 6 Anne, c. 75, to be made). By which act of 1 Eliz. c. 22, it is enacted, that the Queen, during her life, "shall have full power and authority to make and prescribe to every of the said churches, incorporations, and schools, and to all and every the officers, ministers, and scholars, in them or any of them, and to their successors for ever, such statutes, ordinances, and orders, as well for the good use and government of themselves, being officers, ministers or scholars, and for the order of their service, ministry, functions and duties; as also for their houses, lands, tenements, revenues, and hereditaments, with the appurtenances, that her Majesty shall and may at her pleasure, and to alter or change, augment or diminish the same from time to time, as to her shall seem expedient." And the said churches, incorporations, and schools, and every person therein, for which

the Queen shall make any statutes, ordinances or orders, or alter, change, diminish or augment the same, and set forth the same under the great seal of England, shall keep and observe all the same statutes, orders and ordinances, any former rules, laws or constitutions in any wise notwithstanding; and the same so made, ordained and set forth under the great seal, shall be and remain good and effectual to all intents and purposes.

Pursuant to the power vested in the Queen by this act, there seems to have been some sort of confirmation presently made of the statutes of King Henry VIII., for a rule to the several churches, until they could be reviewed and reformed; for so it plainly was in the church of Peterborough, as appears by Bishop Scambler's letter to the Queen concerning those statutes: "After this house was erected (says he) there came to the same certain statutes for the government thereof, under his majesty's name, and so have continued, not without regard; the rather through a confirmation made of them by your majesty's visitors, appointed for that place and countries adjacent, in the first year of your most happy reign."

Afterwards, special power for that end having been inserted in the body of the ecclesiastical commission, new statutes were prepared by the archbishops and others, and finished in the month of July, 1572; and the several bodies were ready for the royal confirmation; but this (for what reason, or by what accident, appears not) was never obtained.

Three years after that, the like power was inserted in the ecclesiastical commission granted to Archbishop Grindall and others.

But nothing appears to have been done in pursuance of those powers, although the inconveniences and mischiefs of wanting a certain rule appear evidently by the tenour of the aforesaid letter which was written to the Queen by Bishop Scambler.

However, thus much is certain, that notwithstanding the recital in the act of 1 Mar., sess. 3, c. 9, that such ordinances, rules and orders could not be made without authority of parliament; the princes of this realm in those days did not think themselves under that restraint, and accordingly King Charles I. and King Charles II. of their own royal authority, did give statutes to several of those churches without any parliamentary sanction to support them.

But still the doubt remained, for the reasons above mentioned, how far any of these statutes were in force.

(4.) And particularly about the year 1706, Dr. Atterbury, then dean of Carlisle, resting solely upon the foundation charter, which (as before expressed) gives unto the dean a power of appointing, ordering, and removing all and every the inferior officers, and ministers of the church, and other persons whatsoever of the said church, extended this clause so far as to take upon himself the sole appointment, ordering, and removing all persons whatsoever any way concerned in the government and

Statutes of
Charles I. and
Charles II.

In Queen
Anne's reign.

revenue of the said church; rejecting at the same time the authority of the local statutes, which limit that general power, and expressly define what officers and ministers only in the said charter are intended. About the same time, Dr. Todd, one of the prebendaries of the said church, strenuously opposed the visitation of the chapter by Dr. Nicholson, then bishop; insisting, that the statutes of King Henry VIII., by which only the bishop is appointed local visitor, were of no force; and consequently, that this being a royal foundation, the power of visitation was in the crown. Upon which Dr. Todd was excommunicated by the bishop, and the proceedings were removed into the Court of King's Bench. In the meantime this dispute involving in it most of the churches of the new foundation, not only upon the aforesaid account of the uncertain authority of their respective local statutes, but also in regard that the originals of the said statutes in some places were perished by length of time, or lost, or destroyed in the Great Rebellion, therefore, that this matter might finally be at rest, the act of 6 Anne, c. 75, was made, reciting as follows:—

6 Anne, c. 75. “Whereas several doubts and questions have arisen, and may hereafter arise, in relation to the validity and force of the statutes of divers cathedral and collegiate churches, founded by King Henry VIII., of famous memory, which doubts and questions have been occasioned, partly by a temporary act of parliament made in the first year of the reign of Queen Mary the First in relation to such statutes, made by the said late King Henry VIII., and in order to defeat the true and pious ends and designs of the said foundations, and partly by reason of the known loss of many records and evidences during the late Rebellion in this kingdom; and whereas the said doubts and disputes may in time not only turn to the great disquiet and prejudice of the said foundations, but may prove a manifest obstruction to the peace, order, good government and discipline of the church, unless some speedy and effectual remedy be provided;” and enacting, “that in all cathedral and collegiate churches founded by the said King Henry VIII., such statutes as have been usually received and practised in the government of the same respectively, since the late happy Restoration of King Charles II., and to the observance whereof the deans and prebendaries, and other members of the said churches, from the said time have used to be sworn at their instalments or admissions, shall be and shall be taken and adjudged to be good and valid in law, and shall be and be taken and adjudged to be the statutes of the said churches respectively; nevertheless, so far forth only, as the same or any of them are in no manner repugnant to, or inconsistent with, the constitution of the Church of England as the same is now by law established, or the laws of the land.” A proviso was appended giving Queen Anne power to alter these statutes or make new ones.

Even on this act doubts and questions arose; one great doubt

has been, Whether by the words "such statutes" in the first restriction, are meant bodies of statutes generally received and practised since the Restoration; or only particular statutes within such bodies as had been received. In the former case, if the whole bodies of statutes are intended, then the several particulars therein are confirmed, although perhaps some of those particulars had not been practised since the Restoration; provided such particulars are not contrary to the constitution of the church or laws of the realm. In the latter case, if particular statutes are only intended, then to know whether any such particular statute is in force, it will be necessary to be informed whether it was generally received and practised during the aforesaid time. The former opinion seems generally to prevail. An instance will render this plain. The charters of foundation do require that the deaneries shall be donative, and conferred by the king's letters patent; but the local statutes (for it is to be observed that the statutes of the several churches are in many respects the same) do require that the dean shall be presented by the crown, and instituted by the bishop; and the particular statute which enjoins this had not in several of the churches been usually practised since the Restoration. And particularly with regard to the church of Gloucester, in the year 1720, the case was stated by the crown to the then attorney and solicitor general, who delivered their opinion according to the following weighty and very judicious report:—

Law officers' opinion as to deanery of Gloucester.

"Gentlemen,

Whitehall, 23rd May, 1720.

"The deanery of Gloucester being become vacant, the bishop of that see apprehends, that by an act of parliament in the sixth year of the late Queen Anne, a new sanction is given to the body of statutes of that cathedral; and that those statutes require, that contrary to the practice of above a hundred years, the dean thereof ought to come in by presentation, and receive institution from him, I herewith send you several copies of records and other papers; which will more fully apprise you of this matter. And I am to signify to you his majesty's pleasure, that you consider of it, and report your opinion, whether the ancient method should take place or a new one be introduced; and that if you think the practice ought to be altered, you do in that case prepare a form of such an instrument as you shall think proper to pass under the great seal for that purpose, I am, &c.

"STANHOPE.

"To his Majesty's Attorney and

"Solicitor General."

"To their Excellencies the Lords Justices.

"May it please your Excellencies :

"In humble obedience to his majesty's commands, signified to us by letter from the Right Honourable the Earl Stanhope, &c., whereby we are informed, that the deanery, &c., (as above)—We have considered of the matters thereby to us

referred, and do most humbly certify your excellencies, That the deanery of Gloucester was erected by letters patents bearing date 7th Sept., 23 Hen. VIII., whereby the king appoints the first dean and prebendaries, and in ordering the precedence of the dean, directs, *quod ipse decanus, et quilibet ejus successorum, per nos nominandi*, shall be next in dignity to the bishop. Then the charter appoints, that the dean and prebendaries shall be a body corporate, and have perpetual succession; *et se gerent, exhibebunt, et occupabunt, secundum ordinationes, regulas, et statuta, eis per nos in quadam indentura in posterum fienda, specificanda, et declaranda*. The king further grants them divers privileges: after which follows a saving clause in these words: *Salvis nobis, heredibus et successoribus nostris, titulo, jure, et autoritate, decanos, prebendarios, et omnes pauperes, ex liberalitate nostra ibidem viventes, de tempore in tempus nominandi, assignandi et praeficiendi, qualitercunque et quotiescunque ecclesia cathedralis praedicta de decano, prebendariis vel pauperibus praedictis, vel eorum aliquo, per mortem vel aliter vacare contigerit, per literas nostras patentes de tempore in tempus ordinare, praeferre et presentare*.

“These are all the clauses in the letters patents of foundation which concern the manner in which future deans were to come in; and we humbly apprehend, that if the question had rested singly upon the charter, this deanery must have been taken to be donative in the crown: for though the word *presentare* is used in the last clause, yet we apprehend that it is not to be understood of a proper presentation to the bishop, because it is brought in only in a saving clause, and that sense seems inconsistent with the other words with which it stands coupled, which import a complete appointment by the crown.

“The case standing thus upon the charter of foundation, we further humbly certify your excellencies, that as there is a clause in the charter referring to future statutes to be given by the king, so it appears to us, that King Henry VIII., in the 36th year of his reign, did give a body of statutes for the better rule and government of the cathedral church of Gloucester; which, however invalid in the original, have in general been esteemed and observed as the statutes of that church ever since. The second chapter of those statutes, intituled ‘Of the Qualification of the Dean,’ of which an English translation only hath been laid before us, has these words: ‘Whensoever the office of dean shall hereafter become void by death, resignation, deprivation, or cession, or by any other means; we will that such person shall be dean, and be so accepted, and enjoy the office of dean in all respects, whom we or our successors shall nominate, elect, and prefer by our letters patents to be sealed under the great seal of us or our successors, and shall think fit to present to the Bishop of Gloucester; which said dean so nominated, elected, and presented, and having been instituted by the bishop, the canons for the time being shall accept and admit for dean of the cathedral church of Gloucester; and the dean upon such his admission,

before he shall take upon him any government in the church, or concern himself in any affairs thereunto belonging, shall take an oath in this form, viz.—

“*I, N., who am elected and instituted dean of this cathedral church, do call God to witness, &c.*”

“The expressions in this statute are somewhat particular and uncommon; but upon the whole, we apprehend, that in case the said statute had been regularly given pursuant to the power reserved by the charter, it would have made a presentation to the bishop necessary in this case, and the dean ought to have received institution from him. But it appears, that the body of statutes, of which this is one, was not given by indenture, which is the only form the charter prescribes; and we find that by an act of parliament made in the 1 Mary, the statutes given by King Henry VIII. to the cathedral churches founded by him are recited to be void.

“For these reasons we are humbly of opinion that this statute was not valid in its original, had no operation to alter the charter, and consequently that the dean ought then to have come in by donation notwithstanding the statutes.

“We farther humbly certify your excellencies that, several copies of instruments under the great seal for constituting deans of Gloucester from time to time, have been transmitted to us; which we have perused and hereto annexed, and find none of them to be in the strict form of a presentation.

“The only precedent which looks that way, is that of Dean Cooper in the 11 Eliz., which is directed to the Bishop of Gloucester, and has in it the word *presentamus*, and requires the bishop to institute him. But it contains also an express grant of the deanery to Cooper; and we beg leave to observe to your excellencies upon this precedent, that it seems framed in conformity to the statute before mentioned about the qualification of the dean, having pursued it in the very words and expressions.

“All the other precedents transmitted to us besides that of Cooper, as well before as since the Restoration, we conceive to be mere grants from the crown.

“This was the state of the case at the time the statute 6 Anne, intituled ‘An Act for Avoiding Doubts and Questions Touching the Statutes of Divers Cathedral and Collegiate Churches,’ was made. And the body of statutes given by King Henry VIII. being (as hath been already observed) originally void, and this deanery (as appears by the precedents) having passed by grant from time to time; we apprehend the single question to be, Whether this act of parliament has given such a sanction to the statute about the qualification of the dean, as to alter the practice of granting which has hitherto prevailed, and make a presentation to the bishop necessary?

“We beg leave to observe to your excellencies, that as far as

we can be informed, this is the first question that hath arisen upon this act; and that, upon consideration of the act, it appears to be drawn in a loose and doubtful manner, and may admit of various constructions.

“The preamble takes notice, that several doubts had arisen, concerning the validity of the statutes of divers cathedral and collegiate churches founded by King Henry VIII.; which had been occasioned partly by an act of the 1 Mary, and partly by reason of the loss of records during the Rebellion, which might prove an obstruction to the good government and discipline of the church: and then it enacts, that in all cathedral and collegiate churches founded by the said King Henry VIII., such statutes as have been usually received and practised in the government of the same respectively since the Restoration, and to the observance whereof the deans and prebendaries, and other members of the said churches from the said time have used to be sworn at their instalments or admissions, shall be and be taken and adjudged to be the statutes of the said churches respectively; nevertheless, so far forth only as the same or any of them are in no manner repugnant to, or inconsistent with, the constitution of the Church of England, as it is now by law established, or the laws of the land.

“The question arising upon this act, material to the point referred to us, is whether by the words—Such statutes as have been usually received and practised since the Restoration—be intended, bodies of the statutes, particular statutes within which bodies have been generally acted under as occasion required; or only, such particular individual statutes as have been actually put in practice? for if this act only confirmed such particular statutes as have been actually practised; then it is clear, that this statute about the qualification of the dean is not confirmed, nor has any greater force than it had originally; there being no pretence of any practice under it since the Restoration. But if the act has confirmed bodies of statutes, particular statutes within which bodies have been generally acted under; then this statute will be in consequence confirmed, notwithstanding it has not been in fact specially observed.

“We apprehend this to be a question of great doubt and difficulty; but, upon consideration of the several parts of the act, we are humbly of opinion, that bodies of statutes, particular statutes in which have been generally acted under as occasion has required since the Restoration, are thereby confirmed; for these reasons:

“In the first place, the doubts and questions, which are recited in the preamble to have arisen, were not concerning any particular individual statutes, but concerning the bodies of statutes given by King Henry VIII., whether they were given in a proper manner; and the reason for which they were declared void by the act of 1 Mary went to the whole body of statutes, and not to particular branches; and it seems reasonable, that the

same expression should have the same signification in the enacting clause as in the preamble.

"Besides, the act does not only confirm such statutes as have been usually received and practised since the Restoration, but makes a further description, viz. And to the observance whereof the deans and prebendaries from the said time have used to be sworn at their instalments: and it is well known that the members of cathedral churches are never sworn to the observance of particular statutes, but of bodies of statutes in general.

"The restrictive clause at the end is likewise observable to this purpose; Nevertheless, so far forth only as the same or any of them are in no manner repugnant to or inconsistent with the constitution of the Church of England as it is now by law established, or the laws of the land. Hereupon we humbly conceive, that the legislators could not apprehend that any particular statutes, inconsistent with the constitution of the church or the laws of the land, had been usually received and practised since the Restoration; but that restriction seems aimed at some parts of the bodies of those statutes, which might possibly relate to popish superstition, and therefore were not fit to be confirmed with the rest.

"Upon the whole, we are humbly of opinion, that the above-mentioned statute about the qualification of the dean has received a confirmation by this act of Parliament, as part of the body of statutes of this church; and consequently, that in the case of this particular deanery a presentation to the bishop according to the terms of that statute is now become necessary. And we have, in humble obedience to his majesty's commands, prepared the form of an instrument (hereto annexed), which we humbly submit to your excellencies, as proper to pass the great seal of that purpose; wherein we have also inserted a clause of grant, and exactly followed the precedent of Dean Cooper, that seeming to us to have been settled with great care in pursuance of the statute. All which, &c.

"R. RAYMOND.

"11 July, 1720.

"P. YORK."

Questions again have arisen concerning the construction of those statutes themselves. As particularly, how far the clause in those local statutes which gives power to the dean, or, in his absence, to the vice-dean and chapter, to choose the minor canons, lay clerks, and other officers therein particularly specified, shall be understood to qualify the general power given by the charter of foundation to the dean to appoint all and every the inferior officers and ministers.

Thus in the church of Bristol, in the year 1751, a dispute of this kind arising, the same was referred to the then Bishops of London, St. David's and St. Asaph, whose determination was as follows: Whereas differences and disputes having arisen between the Reverend Dr. Chamberlayne, dean of the cathedral church of Bristol, and the chapter of the said church, touching

Arbitration
as to Bristol
Cathedral.

the right of naming the precentor, minor canons, grammar schoolmaster, lay-clerks or singing-men, choristers, subsacrist or sexton of the said church, They, the said dean and chapter did, by an act of chapter, dated the 19th of August, 1751, submit the said dispute to the arbitration and determination of the Lords Bishops of London, St. David's, and Norwich, in case he should be able to attend : if not, the Lord Bishop of St. Asaph : and whereas the Lord Bishop of Norwich has, by reason of his constant attendance on the Prince of Wales and Prince Edward, declined the said arbitration, we the said Bishops of London, St. David's, and St. Asaph, have accepted and do hereby accept of the said reference and arbitration, in virtue of the aforesaid act of chapter, and also of two subsequent acts of chapter bearing date the 30th of November, 1751, and the 2nd of March, 1752, as by the said acts (relation being thereunto had) may more fully appear. And we the said arbitrators, having considered the case laid before us, by the Dean of Bristol of the one part, and the prebendaries on the other, and also the papers and documents delivered on each side, in support of their respective claims, particularly and especially the charter of foundation of Hen. VIII. bearing date June 4, in the thirty-fourth year of his reign, and also the body of statutes given by his commissioners to the said dean and chapter, bearing date the 5th of July, in the thirty-sixth year of his reign, are of opinion, and do determine, that the right of naming the precentor, minor canons, grammar schoolmaster, lay clerks or singing-men, choristers, subsacrist or sexton of the cathedral church of Bristol, is in the dean and chapter, and the dean being absent, in the vice-dean and chapter of the said church. In witness whereof we have hereunto set our hands and seals this 23rd day of March, 1752.

THO. LONDON (Sherlock).

RI. ST. DAVID'S (Trevor).

R. ST. ASAPH (Drummond).

Arbitration as
to Gloucester
Cathedral.

Thus also in the year 1764, a like dispute arising in the cathedral church of Gloucester, the same was determined upon reference as follows : Whereas disputes and differences have arisen between the Reverend Dan. Newcombe, D.D., dean of the cathedral church of Gloucester, and Joseph Atwell, D.D., and Samuel Wolley, M.A., two of the prebendaries of the said church, concerning the right of electing and removing the precentor, minor canons, sacrist, subsacrist, schoolmaster, usher, organist, lay clerks and choristers of the said church, they the said deans and prebendaries did enter mutually into bonds dated October 14, 1754, to abide by the arbitration and award of such person or persons as should be in that behalf nominated and appointed arbitrators by the Right Reverend the Lord Bishop of Gloucester, on or before the 30th of November then next, so as the award of such arbitrators be made in writing ready to be delivered on or before November 30, 1755. And whereas the

said bishop did, in pursuance thereof, by writing dated the 3rd day of November, 1754, nominate and appoint us the underwritten to award and determine the said disputes and differences. Now we the said arbitrators, having duly considered the cases laid before us by the Dean of Gloucester of the one part and the said prebendaries on the other, and also the papers delivered in support of their several claims, particularly the charter of foundation of Hen. VIII. bearing date September 4, in the thirty-third year of his reign, and also the body of statutes given by his commissioners to the said dean and prebendaries, bearing date July 5, in the thirty-sixth year of his reign, are of opinion and do determine that the right of electing and removing of the precentors, minor canons, sacrists, subsacrists, schoolmasters, ushers, organists, lay clerks and choristers of the church of Gloucester is in the dean and chapter, and the dean being absent, in the vice-dean and chapter of the said church. In witness whereof we do hereunto set our hands and seals, this 16th day of October, 1755.

THO. CANT. (Herring).

THO. CLERK (Master of the Rolls).

GEO. LEE (Dean of the Arches).

In like manner, there have been several disputes betwixt the deans on the one hand, and the prebendaries on the other, concerning a negative power which the deans have claimed by virtue of the said statutes in divers instances. As in the aforesaid church of Gloucester, about the year 1752, the dean refused to affix the chapter seal to a lease agreed upon by the majority of the chapter; insisting that by the local statutes his consent was absolutely necessary to the validity of such lease, which consent he would not give. But the dean submitted before it came to a judicial determination.

Construction
of statutes as
to powers of
dean.

In the year 1752 and 1753 a like dispute happened in the cathedral church of Carlisle, about the dean's negative power in conferring of benefices. The four prebendaries of which the chapter consisted, one of whom is always vice-dean, unanimously elected and nominated under the chapter seal Mr. Henry Richardson to the perpetual curacy of St. Cuthbert's, Carlisle. The dean entered a caveat against his admission; and the bishop refused to admit and license him. Whereupon it was moved in the Court of King's Bench for a mandamus to the bishop to admit and license the curate.

On showing cause, it was insisted on behalf of the dean, that by the local statutes the dean's consent is necessary, and consequently that without this the nomination is not good. The clauses in the statutes respecting this point are these four:—

In chap. 5. "*De officio decani.*—Statuimus etiam et volumus, in omnibus causis gravioribus, veluti in feodi concessione, terrarum et firmarum dimissione, ac beneficiorum collatione, aliisque id genus rebus, decani (si præsens sit) consensus obtineatur, sin

absens fuerit (modo intra regni nostri Angliæ limites degat) consensus ejus requiratur."

In chap. 6. "De visitatione terrarum.—Porro, quoniam crebra capituli mentio in iis statutis habetur: sub capituli nomine ubique intelligimus mediam ad minus partem totius numeri omnium canonicorum: Ea enim sola tanquam per capitulum recta haberi volumus, quibus media ad minus pars totius numeri omnium canonicorum simul præsens adest, et expresse eidem consentiat: Nam absentium canonicorum suffragium (si quid ferre voluerint) nullo modo valere sinimus, nec alicujus roboris esse."

In chap. 7. "De dimissione terrarum ad firmam.—Præterea volumus, ut nec decanus nec canonicorum ullus terras aut tenementa ulli locet aut ad firmam dimittat, sine consilio et consensu capituli.—Sacerdotia vero, id est, rectoriam, vicariam, aut alia ejus generis ecclesiastica beneficia, ad collationem ecclesiæ nostræ spectantia, decanus cum capitulo, aut (absente decano) vicedecanus cum capitulo conferendi aut episcopo præsentandi jus et potestatem habeant."

In chap. 18. "De officio vicedecani.—Statuimus et volumus, ut vicedecanus qui pro tempore fuerit canonicis et omnibus ministris ecclesiæ nostræ (decano absente, vel decanatu vacante) præsit et prospiciat, eosque in ordine contineat; et quæcunque fieri deberunt per decanum præsentem, quod ad ecclesiæ negotia et regimen pertinet, ipso absente aut ipsius officio vacante, bene et fideliter faciat et ministret."

For the dean it was urged, that by the 5th statute above mentioned, his consent, if he is present, must personally be obtained; and if he is absent, provided he be within the kingdom, his consent nevertheless is required.

To which it was answered, that the 7th statute explains this fully; whereby it appears that the dean and chapter if the dean is present, and if he is absent, the vice-dean and chapter, shall nominate and present.

It was further insisted on behalf of the dean, that the bishop is visitor by the local statutes, and thereby is appointed the expounder and interpreter of the said statutes when any doubt shall arise. But this objection was overruled; partly, as it seems, because Mr. Richardson was no member of the chapter or body corporate subject to the bishop's local visitation, and having by his nomination obtained a temporal right, was therefore properly before the court, to have that right asserted; and partly, perhaps, because this matter of visitation was not then before the court, but would come in regularly upon the bishop's return to the mandamus, if he should so think fit thereupon to return himself visitor; and perhaps partly because this negative power, if given to the dean by the local statutes, might be deemed by the court to be contrary to the law of the land. And the rule for a mandamus was made absolute; setting forth that whereas Henry Richardson, clerk, had been nominated to

the said curacy, and had applied to the bishop to admit and license him, and that the bishop had refused so to do, in contempt of the king, and to the damage and grievance of the said Henry Richardson, and to the manifest prejudice of his estate; therefore the bishop is commanded in the usual form to admit and license him, or show cause to the contrary.

The bishop upon the mandamus admitted and licensed the curate; so that the whole cause upon the merits came not to be determined. If the dean had appealed to the bishop as visitor, and the bishop had determined for the dean's negative power; or if the bishop had returned himself visitor upon the mandamus, and thereupon had proceeded to visit and determine as aforesaid; then upon a prohibition it would have come to be considered, how far these local statutes in this particular are consistent with the laws of the land, according to the third restriction in the statute of 6 Anne, c. 75, before recited.

For the freedom of elections in general it was thus provided by the statute of 3 Edw. 1, c. 5, "Because elections ought to be free, the king commandeth, upon great forfeiture, that no man, by force of arms, nor by malice, or menacing, shall disturb any to make free election."

Elections in
cathedrals.
3 Edw. 1,
c. 5.

Which statute, being general, did evidently include ecclesiastical elections as well as others; but some doubt having probably been made whether they were included, it was judged advisable to move the king for a special declaration to that purpose in the *Articuli cleri*, 9 Edw. 2, c. 14: "If any dignity be vacant where election is to be made, it is moved that the electors may freely make their election, without fear of any power temporal, and all prayers and oppressions shall in this behalf cease. The answer: they shall be made free according to the form of statutes and ordinances:" that is, according to 3 Edw. 1, c. 5, which also was but declaratory of the common law (a).

And by 31 Eliz. c. 6, s. 1, it is enacted, that "if any person or persons, or bodies politic or corporate, which have election, presentation, or nomination, or voice, or assent in the choice, election, presentation, or nomination of any person to have room or place in any the said churches, colleges . . . shall . . . have, receive, or take any money . . . or shall take any promise, agreement, covenant, bond, or other assurance to receive or have any money, fee, reward, or any other profit, directly or indirectly, either to himself or themselves, or to any other of his or their friends for his or their voice or assent . . ." in such election, presentation, or nomination as aforesaid; then and from thenceforth "the place, room or office which such person so offending shall then have in any of the said churches . . . shall be void," and the same may be disposed of in such manner as if such person so offending were naturally dead.

And by sect. 2 ". . . if any fellow, officer or scholar of any

(a) 2 Inst. pp. 169, 632; Gibs. p. 175.

of the said churches . . . or other persons having room or place in any of the same, shall directly or indirectly take or receive, or by any way, device, or means, contract or agree to have or receive any money, reward, or profit whatsoever, for the leaving or resigning up of the same his room or place for any other to be placed in the same, that then every person so taking or contracting or agreeing to take or have anything for the same" shall forfeit double the sum of money or value of the thing so received or agreed to be received or taken; "and every person by whom or for whom any money, gift, or reward as aforesaid shall be given or agreed to be paid, shall be incapable of that place or room for that time or turn, and shall not be had nor taken to be a lawful fellow, scholar or officer, . . . or to have such room or place there," but they to whom it shall appertain shall appoint another as if such person were dead or had resigned.

Procedure on
elections.

And by sect. 3, "for more sincere election, presentation, and nomination of officers . . . and other persons to have room or place in any of the said churches . . ." at the time of every such election, presentation, or nomination, as well this present act as the orders and statutes of such place concerning such election, presentation, or nomination to be had, shall then and there be publicly read, "upon pain that every person in whom default thereof shall be," shall forfeit 40/. All which forfeitures shall be half to him or them that will sue for the same in any of the queen's courts of record, and half to the use of such cathedral or collegiate church where such offence shall be committed.

As to the methods of proceeding in elections, they depend in a great measure upon the local statutes and customs of each cathedral and collegiate body, and therefore cannot be brought under the rules which the ancient canon law has laid down. Elections are said by the canon law to be made in three ways: *per inspirationem*, when all the electors, as if by inspiration, agree in the choice of one person; *per scrutinium*, when three scrutineers are appointed to take the votes; and *per compromissum*, when certain fit persons are deputed, to whom the power of electing is transferred (*b*). Nevertheless it may be of use, in cases which the statutes have left doubtful, or not clearly determined, to set down here some rules relating to elections, which lie dispersed in the body of the canon law. As,

(1) Concerning the time for election, this the canon law determines that it shall not exceed the space of three months from the vacancy, and if it be deferred longer (without lawful impediment) the electors shall for that turn lose their right of election, and the same shall devolve upon those who have the next right, who also shall fill up the vacancy within other three months, on pain of canonical censures (*c*). And after the election they shall notify the same to the person elected, so soon as they reasonably can, who shall assent thereunto within the space of one month, and within three months afterwards shall

(*b*) Inst. Juris. Can. i. 6.

(*c*) X. i. 6, 41.

procure confirmation thereof, otherwise the election (if there be no lawful impediment intervening) shall be void (*d*). But the election, or any citation or process relating thereto, ought not to be before the interment of the deceased (*e*).

(2) Concerning the manner of proceeding to the election, it is ordained, that when canons or prebendaries are wanted, or benefices to be disposed of, the canons absent are to be cited, if conveniently it may be, unless there be a custom to the contrary; otherwise what is done in their absence shall be of no effect (*f*).

So an election of a vicar by trustees was declared void for want of notice of the meeting; for per Lord Hardwicke, "It is so in all corporate bodies, whether the election be by the corporation at large, or by a select number, notice is required, unless the election is to be on the charter, or a particular day, in which case every body is obliged to take notice of it" (*g*).

(3) And no person shall constitute a proxy in the business of election, unless he be absent in a place from whence he ought to be cited (and not in a foreign country, or the like) and hindered by just impediment from attending, of which he shall cause proof to be made upon oath if required. In such case, if he will, he may constitute one of the chapter or collegiate body to be his proxy (*h*).

But if none of the chapter will be his proxy, he cannot depute any other without consent of the chapter, nor give his vote by letter, which ought not to be given before the meeting for the election, but only at that time (*i*).

And if one of the chapter be constituted proxy generally, if he nominate one person upon his own account, and another in the name of his constituent, it shall pass for nothing; but if he has a special proxy, to choose such a person by name, then he may lawfully consent to the election of one in his own name, and to the election of another in the name of his constituent (*k*).

(4) When the election is to be made, and all are present who ought, and will, and can conveniently attend, three of the society shall take the votes of every one, secretly and severally, and put the same in writing, and then immediately publish the same amongst them all; and on casting up the votes, he shall be elected who has the majority of legal votes (*l*).

It is a corollary to this rule that the consent of the electors must be given "*simul et semel*," or "in one place and at one time" (*m*).

(*d*) VI. i. 6, 6.

(*e*) Ib. i. 6, 36.

(*f*) VI. iii. 4, 33. Sæpe enim rescriptum est, magis hac in re unius obesse contemptum quam multorum contradictionem. Inst. Juris. Can. I. 6.

(*g*) *Wilson v. Dennison*, Amb. p. 82.

(*h*) X. i. 6, 42; *Case of the Dean and Chapter of Fernes*, Davis, p. 426.

(*i*) VI. i. 6, 46.

(*k*) Ibid.

(*l*) X. i. 6, 42.

(*m*) *Case of the Dean and Chapter of Fernes*, Davis, at p. 48.

And they cannot vary after the votes are published; for then they ought to proceed to cast up the votes and declare the election (*n*).

(5) By the majority is meant the majority of the whole number of electors; therefore if there are seven electors, and two of them choose one person, and two another, and three another, he who has the three votes shall not be duly elected, as not being chosen by a majority of the electors.

A similar case is decided in the decretal of Gregory (*o*). If certain persons who voted under protest had a right to vote, there were fifty-five electors; but twenty-three only voted for one candidate, and twenty-two for the other. If those persons were excluded, twenty-one had a right to vote; but the numbers in that case were only ten and eight, and the election was declared void; because, according to another text, *licet majorem partem facerent partium comparatione minorum, non tamen ad majorem partem capituli pervenerunt* (*p*). But an exception to this rule took place if he who had the majority of voices was ineligible from his order, age, or learning, and his ineligibility was notorious or made known to the electors; for then his election was to be set aside, and he who had the fewest voices, confirmed (*q*).

Where an integral part of a corporation, composed of a definite number, is required to vote at an election, a majority of such integral definite part, by our law, must attend (*r*). But a charter, and in the absence of a charter, prescription, which is evidence of a charter, may by our law give the right of election to the majority of those present of a definite number, although the number present should not constitute a majority of the full corporation (*s*).

By the majority of legal votes (the *major et sanior pars*) are excluded those who are admitted upon protestation, that their votes shall not be good if it shall appear that they have not a legal right to vote, and it shall afterwards be made appear upon appeal or otherwise that they have no legal right. Now persons may be disqualified several ways: as by custom, or by their own crime, where they have committed any offence which renders them incapable. So persons under suspension, or under the greater excommunication, can neither be electors, nor be themselves elected (*t*).

But if a member be in possession, although not of right, he may be an elector, and such election is valid, provided he be in quiet possession, because he believes that he has right (*u*). But if from the first, before the election is made, it shall be denied that he has such right, and he is admitted under protestation, that his voice shall be valid if indeed it ought to be valid,

(*n*) X. i. 6, 58.

(*o*) Ibid.

(*p*) X. i. 6, 50.

(*q*) X. i. 6, 22.

(*r*) *Rex v. Bellringer*, 4 T. R.

p. 810; *Rex v. Miller*, 6 T. R. p. 268.

(*s*) *Rex v. Hoyte*, 6 T. R. p. 430.

(*t*) *Inst. Juris. Can. I. 7.*

(*u*) X. i. 6, 24.

and that it shall not be valid unless it shall appear that he has such right; in such case his possession shall not avail.

Where the votes are equal, one who is an elector being chosen, shall have the preference before one who is not an elector: As for instance, if there are seven voters, and three of them choose one of the seven, and other three choose another who is not of the seven; he of the seven who is chosen shall have the preference, provided he himself consent and agree to his election, and there be no canonical impediment (*x*).

And this introduces the act of 33 Hen. 8, c. 27, which is as follows:—"Albeit that by the common laws of this realm of England, all assents, elections, grants and leases, had, made and granted by the dean, warden, provost, master, president, or other governor of any cathedral church, hospital, college, or other corporation . . . with the assent and consent of the more or greater part of their chapter fellows or brethren of such corporation having voices of assent thereunto, be as good and effectual in the law to the grantees and lessees of the same, as if the residue or the whole number of such chapter fellows and brethren of such corporation, having voices of assent, had thereunto consented and agreed; yet the said common laws notwithstanding, divers founders of such deaneries, hospitals, colleges, and corporations within this said realm, have upon the foundation and establishment of the same deaneries, hospitals, colleges and other corporations established and made (amongst other their peculiar acts) local statutes and ordinances, that if any one of such corporation, having power or authority to assent or dissent, should and would deny any such grant or grants, that then no such lease, election or grant should be had, granted or leased; and for the performance of the same, every person having power of assent to the same have been and be daily thereunto sworn, and so the residue may not proceed to the perfection of such elections, grants and leases, according to the course of the common laws of this realm, unless they should incur the danger of perjury: for the avoiding whereof, and for the due execution of the common law universally within this realm, and every place in one conformity of reason to be used," it is enacted "that all and every peculiar act, order, rule, and estatute, heretofore made, or hereafter to be made by any founder or founders of any hospital, college, deanery, or other corporation, at or upon the foundation of any such hospital, college, deanery, or corporation, whereby the grant, lease, gift, or election of the governor or ruler of such hospital, college, deanery, or other corporation, with the assent of the more part of such of the same hospital, college, deanery, or corporation, as have or shall have voice or assent to the same, at the time of such grant, lease, gift, or election hereafter to be made, should be in any wise hindered or let by any one or more, being the

Election by
majority.
33 Hen. 8,
c. 27.

(*x*) X. i. 6, 33.

lesser number of such corporation, contrary to the form, order and course of the common law of this realm of England, shall be from henceforth clearly frustrate, void and of none effect: and that all oaths heretofore taken by any person of such hospital, college, deanery, or other corporation, shall be, for and concerning the observance of any such order, estatute, or rule, deemed void and of none effect; and that from thenceforth no manner of person or persons of any such hospital, college, deanery, or other corporation, shall be in anywise compelled to take an oath for the observing of any such order, estatute, or rule"; on pain of every person giving such oath to forfeit for every time so offending, the sum of 5*l.*, half to the king, and half to him that will sue for the same in any of the king's courts of record.

"The act," Dr. Burn says, "seemeth to be expressed in terms somewhat inaccurate and confused; but the manifest intention is, to establish the rule of the common law, that a majority of the body corporate should bind the rest. In some parts of the act the dean seemeth to be contradistinguished from the chapter; so as that the negative of the inferior number of the chapter only, exclusive of the dean, was hereby intended to be taken away: but the other parts of the act seem to explain this; expressing that 'all local statutes, whereby the grant, lease or election of such corporation should be any wise hindered by any one or more, being the lesser number of such corporation, contrary to the course of the common law, shall be void.' And it is certain the dean is one and but one member of the body corporate."

*The King v.
Bland.*

In the case of *The King v. Dr. Bland*, provost of Eton (*y*), in 14 Geo. 2, Mr. Parsons having been elected by a majority of the provost and fellows to the vicarage of Newington, the provost refused to put the college seal to the presentation. Whereupon a mandamus was moved for to compel him. And the court granted a mandamus, that all these things might be determined on the return. But the matter went no further.

*Dr. Hascard v.
Dr. Somany.*

In the year 1761, a like doubt arose in the cathedral church of Chester, upon the vacancy of two chapter livings, the dean apprehending that he had a negative in the case of presentation by virtue of the local statutes. But upon the opinions of a very able advocate and two eminent counsel against such negative

(*y*) The cases of *Richardson* (see p. 157, *supra*) and of *Bland*, and *Hascard v. Somany*, and the remarks of Dr. Burn on this statute of 33 Hen. 8, c. 27, were relied on by Sir W. Follett in *Reg. v. Kendall* (1 Q. B. p. 380), in his successful application to the Court of Queen's Bench for a mandamus to the master of a hospital to cause the corporate seal to be affixed to a presentation of a clerk nominated by the major part of the brethren

and master. Part of the marginal note to the report is to this effect: "Where the majority have nominated the party at a corporate meeting and the master refuses to put the common seal to a presentation, this court will compel him to do so by mandamus; and it is no answer to the writ that there are visitors appointed by the founder to whom disputes between the master and the brethren are to be referred."

power, the dean acquiesced in affixing the chapter seal to presentations agreed upon by a majority of the body corporate.

A majority of the chapter is necessary to constitute a valid election, but the Court of King's Bench will grant a mandamus to compel an election at the peril of those who resist; and perhaps the bishop by ecclesiastical censures may also compel them to do their duty, but he cannot by his ordinary or visitatorial power fill up a vacancy which the chapter has not filled up in due time (z). And the court doubted whether the bishop could in the case of such a vacancy make a temporary appointment. Per Buller, J. Many points have been decided by this court on great deliberation. It has been resolved—1. That a mandamus will lie to compel the dean and chapter to fill up a vacancy among the canons residentiary; and on such a mandamus the court will compel an election at the peril of those who resist. 2. That the election is in the dean and canons. 3. That the dean has no casting vote. 4. That the canons have a right to vote by proxy. 5. That there is no lapse to the bishop in the case of a canonry.

Majority necessary.

No lapse of canonry.

If the lesser number of the electors proceed precipitately to make election before the rest who ought to be present are come in, such election is void, although the major part of the whole number should assent to it afterwards. But if after such undue election made, and divers of the electors are gone home, they who remain shall proceed to another election, such other election is also void; for they ought to appeal (a).

A pre-election into a place not vacant is void. And so it was declared in the Court of Queen's Bench. In *Stainhoe v. Owen*, Dr. Owen was elected prebendary in the church of St. David's, where such elections had been usual, when all the prebends were full; but upon a vacancy Dr. Stainhoe was admitted, and the court would not grant a mandamus to admit Dr. Owen, because (as is there said) it was a ridiculous custom to elect where no prebend was vacant, for that there cannot be an election but into a void place (b).

Pre-election into a place not vacant, is void.

(z) *The Bp. of Chichester v. Harward and Webber*, 1 T. R. p. 650.

(a) X. i. 6, 33.

(b) 2 T. Jones, p. 199. This case seems to be somewhat misrepresented: The prebends at St. David's were in the gift of the bishop, and therefore the election could not be to a prebend. But there were in that church six residentiaryships; and to one of these it seems the pre-election was made. Three of the residentiaries were named by the bishop, viz., the chantor, chancellor, and treasurer. The other three were elective out of the body of the prebendaries. The custom

had prevailed for some time, for the six to agree to elect a seventh supernumerary; who should in return of the obligation keep residence, and do the business of his electors; and should succeed to the next vacancy in the chapter by election. It seems, from the above-mentioned report, that Dr. Owen having been thus pre-elected, was refused to be admitted. Upon which he moved for a mandamus; but the court would not grant the same, such pre-election being merely void. This custom at St. David's, after some endeavours to be continued, had some time ago entirely ceased.

It is true there may be a pre-election; and upon a death the person may afterwards be admitted: but such pre-election binds not the body, so as that they may not elect any other when the vacancy happens; especially, where the electors are the patrons, and are also the persons to admit. The caution given in this case by the canon law is, not to choose to the place which shall be next vacant; but if they choose a man to be a brother or a fellow of the society, and promise to confer upon him the next vacant benefice, such election is good (c).

Cathedrals
visitable by
the ordinary.

That all deans and chapters are subject to the visitation of the bishop "*jure ordinario*," and of the archbishop of the province "*jure metropolitico*," is a well-established maxim of ecclesiastical law. The exercise of such visitatorial power has been transmitted to us from the authority of the primitive church, incorporated into and inculcated by the canon law, and, wherever a question has arisen, supported by the temporal courts. Sir John Comyns, in his Digest, lays it down as clear law, that "all spiritual persons generally are subject to the visitation of the bishop or other ordinary," and that "a dean of right is visitable by the ordinary" (d). The Council of Trent very carefully restored the old doctrine of the canon law upon this subject (e). In Dyer's Reports will be found the case of Goodman, Dean of Wells. Edward VI. made Dr. Goodman dean of Wells; the Bishop of Bath and Wells held a visitation, through a civilian, Dr. Meyrick, his commissary, who deprived Goodman, on the ground that he held a stall in the cathedral of which he was dean. Queen Mary appointed delegates to revise their sentence, and they restored Goodman: in the succeeding reign of Elizabeth, he was again deposed, and Turner, previously appointed by Edward VI., installed in the deanery. A question afterwards arose at common law, and a trial at bar took place by a jury of the county of Somerset: the Judges held that the deanery was a spiritual and not a temporal possession, and therefore visitable by the ordinary, and that Goodman had been justly deposed by Dr. Meyrick. The reporter adds this note to the case: "It was held that the dean was visitable by the bishop *non obstante* the saving in the act" (f). Bishop Gibson gives another precedent in his Appendix, where the Dean and Chapter of Exeter were visited by the Archbishop of Canterbury in Richard the Second's reign (1384), the bishopric being vacant. In this case the visitor being doubtful as to the titles by which some of the canons had obtained their offices, held a visitation, and in the meanwhile directed the revenues to be kept in safe custody (g).

Goodman's
Case.

Exeter
Cathedral.

Canterbury
Cathedral.

In Strype's Memorials will be found an account of a metro-

(c) Gibs. pp. 176, 7, 8; X. iii. 5, 19.

(d) Comyns' Digest, vol. vii. p. 547, tit. Visitor (A 6). See Hughes, c. 28.

(e) Conc. Trid. sess. vi. c. 4; sess. xxv. c. 6.

(f) Walrond v. Pollard, Dyer, p. 273 a.

(g) Gibs. p. 1333.

politan visitation of Canterbury by Archbishop Matthew, and the articles of inquiry exhibited on the occasion (1560), and of the same province by Archbishops Grindal (1576), and Whitgift (1583) (*h*).

The records of the Dean and Chapter of St. Paul's contain various precedents for the episcopal visitation of their cathedral, and one only of a metropolitan visitation, that by Archbishop Laud, in 1636, against which they presented the following remonstrance to the king:—

St. Paul's
Cathedral.

“To the King's most excellent Maj^{tye}.

“The humble petition of the Dean and Chapter of the Cathedrall Church of St. Paul, London.

“Humbly sheweth unto your sacred Maj^{tye}.

“That whereas the L^d Archbishop of Canterbury, his grace by his sūmons to that purpose directed to us the Deane and Chapter of St. Paule, hath signified his grace's purpose by his metropolitall power to visit the s^d church: and whereas it doth not appeare by any records belonging to his grace or the church, that the deane and chapter have ever been visited by any metropolitall power, notwithstanding the rest of the diocesse hath been so visited: and whereas the said deane and chapter doe acknowledge that they hold immediately from your maj^{tye} all their priviledges which they take themselves bound by oath to pserve entire so far as in them lyeth, but withall most tender in all things to show themselves obedient to your maj^{tye}'s pleasure, and the p^sent government of the church, doe humbly beseeche your maj^{tye} you would be graciously pleased to take the pmisses into your royall consideration, and to give such order therein, as your maj^{tye} in your wisdome shall think fitt.

“And your petitioners as in all duty bound shall ever pray, etc.”

And received the following answer:—

“At the court att Whitehall, Apr. 27, 1636.

“His Maj^{tye} approves well of the modestye of these pet^{rs}, but withall is resolved for the settlement of peace and good order in the church, that no place without speciall grounds of priviledge shall be exempt from archiepiscopall visitation: and least of all this church of St. Paul, in regard it appears by their owne suggestions that the rest of the diocese hath been visited, and *de jure ordinario* it is knowne that the archb^p or b^p ought to begin his visitation att the cathedrall, and they can shew no act in any their registryes, that the archb^{ps} did not visit their church att the same time when they visited the diocesse: and therefore his maj^{tye} requires submission of the dean and chapter to the visitation of the present Archb^p of Canterbury, and of his successors, and wills that this be registred both in the archb^p's office, and in their owne accordingly.

“JOHN COKE.”

(*h*) Strype, Life of Parker, vol. i. p. 144; of Whitgift, vol. i. p. 246—411; of Grindal, p. 313. See also

Life of Cranmer, vol. i. p. 249, for that metropolitan's visitation.

This visitation began in 1636 and lasted till 1638. The dean, in the name of the chapter, entered a protest in Latin against its length—"in præjudicium mei decani et capituli ecclesie cathedralis."

The ordinary visitations of this ancient cathedral, of which any memorial has been preserved, begin in 1374, and end in 1743, in the following order:—

Visitatio ecclesie per Simonem de Sudburie Epis. Lond. 1374.

Bishop Bancroft's visitation, 1558.

Bishop Grindall's visitation, 1559.

Bishop Compton's long visitation, 1696.

Bishop Gibson's first visitation (against which the dean and chapter remonstrated), 1724.

In this visitation, articles of inquiry were as usual administered to the dean and chapter, who exhibited their answers. But the injunctions, 1, relate to "an evil custom of great numbers of persons walking and talking in the body of the cathedral church during the time of divine service in the quire," which the dean and residentiaries are desired to prevent, and if need be, cause the canons and other laws to be executed against such offenders, especially the 18th canon and the statute of 1 William and Mary, c. 18; 2, enjoin the observance of an injunction of his predecessor Bishop Compton as to daily morning service commencing at ten o'clock; 3, enforce the duties of preaching by dignitaries and prebendaries; 4, that the books of former statutes and former injunctions, with these injunctions added to them, be kept in the archives of the chancel, under the custody of the chapter clerk, and that those who are sworn to this observance may have free access to them.

Bishop's visitation when Dr. Andrews was canon residentiary (i).

In 1847, the sub-dean appealed to the visitor (Bishop Blomfield), claiming a right, founded on the statutes, to be presented to the living of Cripplegate, to which a canon, Archdeacon Hale, had been presented. The case was heard by the bishop, with Mr. Justice Patteson and Dr. Lushington for assessors. The decision was adverse to the claimant; no reasons were given, but the ground was, that though the statute was clearly proved, and the right of the sub-dean under it, no instance of an appointment under it could be shown, and the date of it was very early.

Since 1849, the visitor has again been appealed to.

The records of the registry at York abound in precedents, among which may be remarked those of Archbishop Holgate, in 1552; of Frewin, in 1662 (Dr. Burwell, a civilian, acted as commissary to Frewin in this case); of Sterne, in 1667; of Sir W. Dawes, in 1715. This last visitation (*i. e.*, of Archbishop Dawes) arose from the appeal of a vicar-choral to his

York
Cathedral.

(i) I cannot find the date. Andrews was canon from 1589 to 1597.

grace, as visitor, from a sentence of the dean and chapter. The usual practice seemed to have been to appoint a commissary to hold the court; but in this case the archbishop appears to have sat in person; but it is said, "*maturâ deliberatione prehabita de et cum consilio jurisperitorum—observatisque omnibus et singulis de jure in hac parte observandis.*" The sentence of the dean and chapter was confirmed by the archbishop, as it was afterwards by the Court of Delegates, to whom it was still further appealed. The last precedent was in 1841, when the then Archbishop of York (Harcourt), in order to allay certain dissensions, and remedy certain grievances in the cathedral of York, exercised his visitatorial power, "*jure ordinario*," and after opening the court in person, appointed Dr. Phillimore his commissary or judge, to inquire into the alleged grievances, and adjudicate on the matters in dispute (*k*).

The manner of proceeding in a visitation of this description is to issue inhibitions to all inferior jurisdictions, and a citation to the dean or residentiary canon, who cites all members of the cathedral body in an instrument embodying the citation of the ordinary; and on the return of the citations, and the opening of the court, to exhibit articles of inquiry, and, according to the answers given in and the discussions which take place upon them during the sitting of the court, to issue injunctions, ordering all disorders, of which the existence has been proved, to be rectified. The personal appearance of the members of the cathedral body, and the execution of the injunctions, may be enforced like any other process of an ecclesiastical court. As this is a very curious subject of ecclesiastical law, and of not very frequent occurrence, I have thought it advisable to print the form of articles of inquiry exhibited at the visitation of York in January, 1841, and framed in careful compliance with former precedents.

Procedure at visitation.

ARTICLES.

"1. Imprimis—Whether is divine service duly and reverentially performed in your church without alteration, addition, or diminution, according to the laws and statutes of the realm, and according to the canons of the church and the rubric of the Book of Common Prayer by law established, and if not, who is in fault?"

Articles of inquiry exhibited by ordinary in a visitation of his cathedral.

"2. Item—What progress has been made in the repairs of the fabric of your church since the late calamitous fire? What is the amount of the sum belonging to the fabric which can be immediately appropriated to the repairs of the same?"

"3. Item—Have any of the bells, lead, iron, or other materials which were damaged by the fire been sold; and if sold, for what sum? Have the proceeds arising from any such sale been

(*k*) The practice seems to have varied as to appointing a civilian as commissary or as assessor. Bishop

Gibson chose an assessor. Sometimes also two commissaries have been appointed.

applied to the reparation of the fabric, and if not, in whose hands does the custody of them remain?

“4. Item—What lands and tenements have you belonging to the fabric of your church, and what is the value of them, and what is the yearly reserved rent, respectively? Declare your knowledge.

“5. Item—What leases have been made of your fabric lands? And have the fines received from the same been duly expended on the fabric of the church, and to no other use, or are they reserved and kept in the manner prescribed by your statutes? Declare your knowledge herein, and whether all the monies and rents belonging to the fabric have been properly brought to account, and held by the chapter clerk for the use of the church.

“6. Item—To what extent have the acts for the improvement in the minster yard, viz. the 54 Geo. 3, and 6 Geo. 4, been carried into effect?

“What agreements have been entered into between the dean and chapter, on behalf of the fabric, and the dean, in furtherance of those acts? What was the nature of the agreement of the 22nd July, 1828? Who were parties to that agreement, and by whom was that agreement signed?

“Are the acts for the improvement of the minster yard adequate to their object, and capable of being carried into full effect, or is it expedient and advisable that resort should again be had to the legislature to bring the affairs of the dean and chapter and the fabric to a complete and satisfactory arrangement?

“7. Item—Whether do you the dean and chapter make your capitular acts in your chapter house, and are they duly registered and observed? Is your common seal kept according to the statute in that case made and provided, and how do you audit the accounts of your rents and revenues?

“8. Item—Are all negotiations for renewals, agreements for leases, and all contracts for the purchase or alienation of property duly treated of and settled in chapter?

“9. Item—How and under what formalities and what safeguards are orders for work and agreements for expenditure made by you? And on what authority are your bills on the dean and chapter's and on the fabric accounts liquidated? Are all such accounts duly entered in a book, and regularly audited, and by whom are they audited?

“10. Item—Are the fines and rents of your common estates, and of the fabric estates, received by the chapter clerk? And are legal discharges given by him for the same?

“11. Item—Do you the dean and chapter duly hold your said chapters? Do you give sufficient notice beforehand of the holding of such chapters? Has there been any let or impediment interposed to the holding of chapters? Declare your knowledge.

“12. Item—Has any exclusive power or paramount authority been claimed or exercised by the dean or any other of the

residentiaries, either in the transaction of the business of the chapter, or over the members of the chapter?

"13. Item—Is the library belonging to your said church carefully superintended and kept in good order? To whom is the custody of it confided? Have all the residentiaries and other members of the chapter free access to the same? And who have keys of the said library?

"14. Item—Are the records and muniments belonging to the dean and chapter deposited in a convenient place, and preserved from dust and damp, kept in good order, and carefully and methodically arranged.

"15. Item—Have you the residentiaries duly kept residence for the term prescribed by the statute? If not, state the grounds on which such residence, or any portion of the term of such residence, has been omitted, whether it has been through sickness or any other urgent cause; and state whether during the period of such omission (if any such has occurred), any other member of the chapter has regularly attended the performance of divine service in the stead and on the behalf of the residentiary aforesaid.

"16. Item—What change has of late years taken place with respect to the canonical houses? In what house or houses is the residence of the dean and canons respectively now kept? Does the dean always reside in the deanery, and does the residentiary always reside in a canonical house?

"17. Item—Are you the dean and chapter feoffees in trust for any schools, hospital, or any other pious foundation? What manors, lands or tenements belong to them and every of them respectively, and of what yearly value, what leases are there of the same, when and by whom, and for what term of years or lives granted? What fines on the last renewals of those leases were received, and by whom? How have they been employed, or in whose hands do they now remain? Are the houses and edifices thereunto belonging kept in good repair?

"18. Item—Are the children in the schools belonging to the dean and chapter diligently taught and instructed? Do the schoolmasters catechise the scholars, and instruct them otherwise in the principles of religion; and are the houses, lodgings and buildings belonging to the said schools or school, duly used and employed according to the intention of their founders?

"19. Item—Are the chancels of the churches and chapels belonging to the dean and chapter, and the other members of your body, in good and sufficient repair?

"20. Item—Is the rota of preaching enjoined by Archbishop Holgate to the prebendaries and other dignitaries in your church, still in use and observance? If not, how has the arrangement of turns of preaching been altered? And in what way will the existing practice be affected by the existing statute 3 & 4 Vict. c. 113.

"Jan. 18th, A.D. 1841."

"E. EBOR."

Lawfulness
of decora-
tions decided
at visitation.

It has been recently decided that a bishop may at a visitation of his cathedral, and of the dean and chapter thereof, hear and determine any question raised as to the lawfulness or unlawfulness of any decoration set up in the cathedral (*i*).

Appeal.

From the decision of the bishop in such a case, if it be within the province of Canterbury, the appeal lies to the Official Principal of the Arches Court of Canterbury (*j*).

Public
Worship
Regulation
Act, 1874.

By the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), ss. 8, 17, provisions are made for representations of the introduction of unlawful decorations or ceremonies into a cathedral or collegiate church being preferred according to that act, and for enforcing decisions thereupon (*k*).

Pluralities
Act.

By 48 & 49 Vict. c. 54, The Pluralities Acts Amendment Act, s. 3, one of the commissioners on any commission issued under that act "shall be a canon residentiary, prebendary or honorary canon of the cathedral church of the diocese wherein the benefice is situated elected as hereinafter provided." By s. 4, "the dean and chapter of every cathedral church . . . together with the canons non-residentiary or honorary, as the case may be, or where there is no dean and chapter the canons residentiary and honorary," are forthwith and at the end of every three years, to elect one of their body to be such commissioner for the ensuing three years.



SECT. 3.—*The Law since the Statutes of William the Fourth and Victoria.*

Statutes of
Victoria as to
cathedrals.

The acts of 3 & 4 Vict. c. 113, 4 & 5 Vict. c. 39, and 6 & 7 Vict. c. 77, wrought an extensive change in the condition and constitution of deans and chapters. The first act was passed on the 11th August, 1840, and entitled "An Act to carry into effect, with certain Modifications, the Fourth Report of the Commissioners of Ecclesiastical Duties and Revenues." It recited that, under the 6 & 7 Will. 4, c. 77, the commissioners first mentioned in the said act, in their fourth report to his late majesty, had made certain recommendations touching cathedral and collegiate churches, and other things in the said report specified: And that it was expedient that the said recommendations should be adopted, with certain alterations. It dealt with the status of deans, canons, chapters and minor canons. It founded some new canonries and a new institution of honorary canons. It made provision for annexing canonries to arch-deaconries, for the alteration of statutes, authority of visitors, for the disposition of patronage, both as to the appointment of deans and canons and the incumbents of benefices, for residence

(*i*) *Phillpotts v. Boyd*, L. R., 6 P. C. p. 435.

(*j*) *Boyd v. Phillpotts*, L. R., 4

Adm. & Eccl. p. 297. Vide *infra*, Part IV., Chap. IV.

(*k*) Vide *infra*, Part IV., Chap. IX.

houses, for the University of Durham, and for some other matters of general ecclesiastical importance.

It was considerably amended by 4 & 5 Vict. c. 39, generally, and by 6 & 7 Vict. c. 77, as to the Welsh cathedrals. Since then various amending acts have been passed, 13 & 14 Vict. c. 41 (Manchester), 13 & 14 Vict. c. 94, 23 & 24 Vict. c. 124 (Estates), 27 & 28 Vict. c. 70 (Minor Cathedral Corporations), 29 & 30 Vict. c. 111 (Westminster), 31 Vict. c. 19, and 31 & 32 Vict. c. 114 (Estates), 36 & 37 Vict. c. 39, and 36 & 37 Vict. c. 64 (Lichfield).

By sect. 1 of 3 & 4 Vict. c. 113, "From henceforth all the members of chapter, except the dean, in every cathedral and collegiate church in England, and in the cathedral churches of Saint David and Llandaff, shall be styled canons; and the precentor of the cathedral church of Saint David, and the warden of the collegiate church of Manchester, shall be respectively styled dean."

Members of chapters to be deans and canons.

The constitution of a chapter is defined by sect. 16 of 4 & 5 Vict. c. 39:

Chapters.

"In every cathedral church in which any canonry or canonries is or are to be suspended, a majority of the existing members of chapter, including or not including the dean, according as his presence may or may not be by law required, shall at all times be a sufficient number of canons for constituting a chapter."

Majority of members to constitute a chapter.

Returning to 3 & 4 Vict. c. 113, we find it enacted by sect. 44, "That upon the vacancy of any benefice in the patronage of the chapter of any cathedral or collegiate church, the chapter shall present or nominate thereto either a member of such chapter, or one of the archdeacons of the diocese, or a non-residentiary prebendary or honorary canon, as the case may be, or any spiritual person who shall have served for five years at the least in the office of minor canon or lecturer of the same church, or of master of the grammar or other school (if any) attached to or connected with such church, or as incumbent or curate in the same diocese, or as public tutor in either of the universities of Oxford and Cambridge, or who, so far as relates to the cathedral church of Durham, shall have served for the like term in the office of professor, reader, lecturer, or tutor in the said university of Durham, or shall have been educated thereat and shall be a licentiate or graduate in theology therein, or who shall have served as incumbent or curate within the same diocese for the period aforesaid (1); and that every such office of minor canon, lecturer, schoolmaster, professor, reader, lecturer, or tutor shall immediately upon the expiration of one year from the time of his institution to such benefice, if not previously resigned, become

Exercise of patronage of chapters.

(1) Provisions for applying this condition, when a new diocese is formed, will be found in 38 & 39 Vict. c. 34, s. 15; 39 & 40 Vict. c. 54, s. 10; and 41 & 42 Vict. c. 68, s. 12.

and be vacant; and that if neither a member of the chapter nor an archdeacon of the diocese, nor a minor canon, nor lecturer, nor such schoolmaster, incumbent, or curate, professor, reader, lecturer, tutor, licentiate, or graduate, as the case may be, shall be presented or nominated to such benefice within six calendar months from the time of the vacancy thereof, the bishop of the diocese in which the same is situate may within the next six calendar months collate or license thereto a spiritual person who shall have actually served within such diocese, as incumbent or curate, for five years at the least; and if no such collation or licence shall be granted within such time, the right of presentation or nomination to such benefice for that turn shall lapse to the archbishop of the province."

Chapters, or
visitors in
their default,
to propose
alterations in
statutes.

Sect. 47. "That the chapters of the several cathedral and collegiate churches shall from time to time, of their own accord, or upon being required by the visitors of the said churches respectively, propose to such visitors such alterations in the existing statutes and rules as shall provide for the disposal of the benefices in their patronage, so as to meet the just claims of the minor canons of such churches, and as shall make them consistent with the constitution and duties of the chapters respectively as altered under the authority of this act; and all such alterations, if approved, may be confirmed by the authority of such visitor; and that in any case in which such alterations shall not be approved, or in which such requisition shall not be complied with within twelve calendar months after the making thereof, the visitor shall be at liberty of himself to make the necessary alterations; and all such statutes and rules when so altered shall be submitted to the ecclesiastical commissioners for England, and may be confirmed by the authority hereinafter provided; and that as to any alteration made by a visitor alone, the said commissioners shall communicate a draft thereof to the chapter to be affected thereby, and shall, together with any scheme to be prepared by them under the authority herein-after contained, lay before her Majesty in council such remarks as may within three months have been made thereon by such chapter; and that out of the proceeds of the suspended canonries in any chapter provision may from time to time be made, by the authority hereinafter provided, for relieving the present canons of such chapter from the performance of any additional duty by reason of such suspension, by the employment of substitutes, to be approved by the respective bishops; provided always, that nothing herein contained shall be construed to affect any existing right of chapters with their visitors to make statutes."

Deans.

As to deans the enactments are as follows:

Sect. 21 suppressed the deaneries of Wolverhampton, Middleham, Heytesbury and Brecon.

Deans of old
cathedrals
and three
canons of

By sect. 24, "The deanery of every cathedral and collegiate church upon the old foundation, except in Wales, and the three existing canonries in the cathedral church of Saint Paul, in

London, shall henceforth be in the direct patronage of her Majesty, who shall and may, upon the vacancy of any such deanery or canonry, appoint, by letters patent, a spiritual person to be dean or canon, as the case may be, who shall thereupon be entitled to installation as dean or canon of the church to which he may be so appointed."

St. Paul's, to be appointed by her Majesty.

By sect. 27, "No person shall hereafter be capable of receiving the appointment of dean, archdeacon, or canon, until he shall have been six years complete in priest's orders, except in the case of a canonry annexed to any professorship, headship, or other office in any university."

Qualification of deans, archdeacons and canons.

By sect. 43, "In the construction of this act the said free chapel of St. George, in Windsor, shall be held to be included in the term collegiate church;" and provision is made for detaching and dissevering the rectory of Haseley, in the county of Oxford, from the deanery; and the rectory is to be in the patronage of the chapter.

Haseley rectory to be severed from the deanery of Windsor.

By 36 & 37 Vict. c. 64, the rectory of Tatenhill is severed from the deanery of Lichfield, and the advowson is vested in her Majesty, and the endowments are vested in the Ecclesiastical Commissioners who are thereout by scheme to make provision for the spiritual duties of the parish (*m*).

Tatenhill rectory severed from the deanery of Lichfield.

It is further enacted by sect. 5 of 4 & 5 Vict. c. 39:

"That the holding of a canonry residentiary, prebend, or office is not nor shall be necessary to the holding of the deanery of any cathedral church in England, nor to the entitling of any dean to his full share of the divisible corporate revenues of such church, although such share may not heretofore have been received by any preceding dean otherwise than as a canon residentiary; and that the holding of a prebend is not nor shall be necessary to the holding of either of the residentiary canonries in the cathedral church of Saint Paul, in London, which are in the direct patronage of her Majesty."

Deans need not hold prebends.

By 13 & 14 Vict. c. 94, s. 19, no dean appointed after April 10, 1850, is to hold any benefice except in the cathedral town and with an annual income under 500*l.* (*n*).

Deans not to hold pluralities.

The deans and chapters of the Welsh cathedrals are governed by a special act: 6 & 7 Vict. c. 77; the provisions of which are analyzed, *infra*, at p. 185.

By 13 & 14 Vict. c. 98, s. 5, no dean may hold the office of head ruler of any college of Oxford or Cambridge, or of Provost of Eton, Warden of Winchester, or master of the Charterhouse, the Dean of Christ Church, Oxford, of course excepted.

With respect to canons the enactments are numerous and various, as will be seen: Canons.

Sect. 93 of 3 & 4 Vict. c. 113. "In the construction of this act the term 'canon' shall be construed to mean only every resi- Construction of the term "canon."

(*m*) This act was rendered necessary by the decision in *Regina v. Champneys*, L. R., 6 C. P. p. 384.

See further 48 & 49 Vict. c. 31.

(*n*) As to Pluralities, vide *infra*, Part IV., Chap. III., sect. 6.

Number of
canons.

dentary member of chapter, except the dean, heretofore styled either prebendary, canon, canon residentiary or residentiary."

Sect. 2. "Subject to the provisions hereinafter contained, the number of canons in the several cathedral and collegiate churches of the new foundation . . . and in the queen's free chapel of Saint George, within the Castle of Windsor, and of canons residentiary in the several cathedral churches of the old foundation in England, shall be the number respectively specified in the schedule hereto annexed."

Cathedral or Collegiate Church.	Number of Canons.	Cathedral or Collegiate Church.	Number of Canons.
Canterbury	6	Lincoln	4
Durham	6	Manchester	4
Ely	6	Norwich	4
Westminster	6	St. Paul's, London	4
Winchester	5	Peterborough	4
Exeter	5	Ripon	4
Bristol	4	Rochester	4
Carlisle	4	Salisbury	4
Chester	4	Wells	4
Chichester	4	Windsor	4
Gloucester	4	Worcester	4
Hereford	4	York	4
Lichfield	4		(o)

Residence
of dean and
canons.

Sect. 3. "In every cathedral and collegiate church the term of residence to be kept by every dean thereof hereafter appointed shall be eight months at the least in every year, and the term of residence to be kept by every canon thereof hereafter appointed shall be three months at the least in every year."

Provisions
for carrying
schedule into
effect.

Secls. 4 to 14 inclusive provide for the reduction of the excess of canonries by suspension, while sect. 16 provides for the addition of one canonry (that is, one canonry residentiary) to Saint Paul's and to Lincoln.

By sect. 4, the canonry held by the archdeacon of Canterbury is preserved, and it and one other are made applicable to the endowment of archdeaconries; and of the remaining four canonries the crown is to have the patronage of three, and the archbishop of one.

By sect. 5, a canonry at Christchurch is annexed to the Lady Margaret professorship instead of a canonry at Worcester; and another canonry is made applicable to the endowment of archdeaconries.

By sect. 6, other two canonries at Christchurch are annexed to new professorships in the university of Oxford.

By sect. 7, except as particularly specified, the act is not to apply to Christchurch.

By sect. 8, six canonries are suspended in each of the cathedral

(o) St. David's and Llandaff were in this schedule, but were taken out by 7 & 8 Vict. c. 77.

churches of Durham and Worcester, and in the collegiate church of Saint Peter, Westminster.

By sect. 9, eight canonries are suspended at Windsor (*p*).

By sect. 10, seven canonries are suspended at Winchester.

By sect. 11, three canonries are suspended at Exeter, one being the canonry held in commendam with the bishopric of Exeter; and one canonry is made applicable to the endowment of archdeaconries.

By sect. 12, two canonries at Ely are to be "annexed and united to the regius professorships of Hebrew and Greek respectively in the university of Cambridge."

By sect. 13, two canonries are suspended at Bristol, Chester, Ely, Gloucester, Lichfield, Norwich, Peterborough, Ripon, Rochester, Salisbury, and Wells respectively; and the sub-deanery at Ripon is to be suspended, and the canonry at Lichfield annexed to the rectory of the church of Saint Philip in Birmingham is to be detached from the rectory and suspended; and at Peterborough a canonry is made applicable to the endowment of archdeaconries.

By sect. 14. "At Hereford a canonry is to be suspended."

Sect. 15 saves from suspension "the canonry in the said chapter of Canterbury now held by the Archdeacon of Canterbury," and "any canonry in the said chapter of Ely which may be annexed to any professorship in the university of Cambridge," and "the canonry in the said cathedral church of Durham which is prospectively annexed to the archdeaconry of Durham by an act passed in the second year of the reign of his late Majesty, intituled 'An Act for separating the Rectory of Easington in the County and Diocese of Durham from the Archdeaconry of Durham, and annexing in lieu thereof a Prebend or Canonry founded in the Cathedral Church of Durham,'" and "the canonries in the said collegiate church of Saint Peter, Westminster, to which the rectories of Saint Margaret and Saint John, Westminster, are hereinafter respectively annexed," and the "canonry in the cathedral church of Gloucester which is annexed to the mastership of Pembroke College in Oxford," and "the canonries in the said cathedral church of Rochester which are respectively annexed to the provostship of Oriel College in Oxford, and to the archdeaconry of Rochester," and "the canonry in the said cathedral church of Norwich which is annexed to the mastership of Catherine Hall in Cambridge," and "the canonry in the said cathedral church of Salisbury which is connected with the residentiary house called Leydon or Leadon Hall," and "any canonry in any cathedral or collegiate church which shall hereafter, under the authority of this act, be permanently annexed to any archdeaconry or archdeaconries, or to any office in the university of Durham."

Proviso respecting the suspension of canonries.

2 & 3 Will. 4, c. 10.

(*p*) By 24 & 25 Vict. c. 116, special provision is made as to the revenues of the 7th & 8th canonries at Windsor.

One suspended canonry may be filled up to endow archdeaconries.

By sect. 16. "Provided always, that in any cathedral church in which by the suspension of canonries the number of canons shall be reduced to four, one of such suspended canonries may by the authority hereinafter provided, if it be deemed necessary for the purpose of endowing any archdeaconry or archdeaconries, be filled up, subject to the provisions hereinafter contained respecting the endowment of archdeaconries by the annexation of canonries thereto."

Power to remove the suspension from canonries under special circumstances.

By sect. 20. "A plan may from time to time be laid before the ecclesiastical commissioners for England by any of the said chapters of the several cathedral and collegiate churches, with the sanction of the visitors of the said churches respectively, for removing the suspension from and re-establishing any canonry or canonries which shall have been suspended by or under the provisions of this act, by assigning towards the re-endowment of any such canonry or canonries a portion of the divisible corporate revenues remaining to the said chapters respectively, after paying to the said ecclesiastical commissioners the profits and emoluments accruing to the said commissioners from the suspended canonry or canonries, so that the profits and emoluments of such suspended canonry or canonries be not diminished by the removal of such suspension; and also by accepting and assigning for the same purpose any further endowment in money, or in lands, tithes, or other hereditaments, such lands, tithes, or other hereditaments not exceeding in yearly value the sum of two hundred pounds for each canonry from which the suspension shall have been so removed; and also by annexing to any such canonry from which the suspension shall have been so removed any suitable benefice or other preferment in the patronage of the said chapters respectively, or of any other patron, with the consent of such patron, and where any bishop is patron, with consent of the archbishop; and any such plan may be carried into effect by the authority hereinafter provided, and such alterations may be made in the existing statutes and rules of the said chapters respectively, as the case may require, under the authority herein provided for making alterations in existing statutes."

By 36 & 37 Vict. c. 39 (The Cathedral Acts Amendment Act, 1873), the powers thus given are considerably extended; and the commissioners are enabled to accept plans for removing the suspension from any canonry without assigning towards the re-endowment of the canonry a portion of the divisible corporate revenues remaining to the chapter (Sect. 1), and further to accept plans for adding new canonries or converting non-residential prebends into canonries, and for accepting endowments from private persons. (Sect. 2.)

The plan may provide for annexing to any such canonry "any spiritual, ecclesiastical, eleemosynary or educational duties for the benefit of the Church of England, and in connection with the diocese" of the cathedral or collegiate church, and for the

residence and participation in the cathedral services of the holder of it, and for limiting the tenure of the holder to a term of years, or making it dependent upon his performing the duties specially assigned. The patronage, unless it be annexed to an existing office, is to be in the crown or in the bishop, where not otherwise provided in the bishop. (Sect. 3.)

The holder of a canonry may be given such rights of membership of the chapter as may be thought advisable, or may be given the status of an honorary canon, or where there are non-residentiary prebendaries, that of a non-residentiary prebendary. The holder is to be visitable by the visitor of the chapter. (Sect. 4.)

The act extends to the Welsh cathedrals.

By sect. 22 of 3 & 4 Vict. c. 113, it is enacted that, "subject to the provisions hereinafter contained," "no presentation, collation, donation, admission, election, or other appointment to the dignity or office of sub-dean, chancellor of the church, vice-chancellor, treasurer, provost, precentor, or succentor, nor to any prebend not residentiary, in any cathedral or collegiate church in England, or in the cathedral churches of Saint David and Llandaff, or in the collegiate church of Brecon, shall convey any right or title whatsoever to any lands, tithes, or other hereditaments, or any other endowment or emolument whatsoever, now belonging to such dignity, office, or prebend, or enjoyed by the holder thereof in right of such dignity, office, or prebend, or any part thereof; provided that nothing herein contained shall be construed to deprive any present or future holder of any office in any cathedral or collegiate church, actually performing duties in respect of such office, of any stipend or other emolument heretofore accustomedly assigned to such office, or paid to the holder thereof, according to the statutes of such church, out of the revenues thereof."

Non-residentiary prebends and offices not to give right to any endowment.

This is, by 4 & 5 Vict. c. 39, s. 7, extended to the offices of "sacrist custos and hospitaller."

By 3 & 4 Vict. c. 113, s. 25. "In the cathedral church of York, so soon as a vacancy shall occur in the deanery, and in the cathedral churches of Chichester, Exeter, Hereford, Salisbury, and Wells respectively, so soon as every person who was a member of the respective chapters of such churches at the passing of this act shall cease to be such member, all the said canonries shall be in the direct patronage of the Lord Archbishop of York and of the bishops of the said respective sees, as the case may be, who shall respectively, upon the vacancy of any canonry in such churches respectively, collate thereto a spiritual person, who shall thereupon be entitled to installation as a canon of the church to which he shall be so collated."

Canons of old cathedrals to be appointed by the bishops.

Upon the construction of this section the Queen's Bench have made the following decision:—In the cathedral church of Hereford the capitular body consisted at the time of the passing of the act of a dean and five residentiary canons, who were called

Reg. v. Dean of Hereford.

the "close chapter," and twenty-two non-residentiary canons, making up the "general chapter." One of the officers in the body was the prælector, who by customary right on a vacancy succeeded to one of the residentiary canonries, and a new prælector was appointed out of the non-residentiary canons by the close chapter.

The non-residentiary canons were appointed by the bishop. At York, the dean alone appointed the residentiary canons from out of the non-residentiaries. Since the passing of the act a prælector had been appointed at Hereford; and the last of those persons who were members of the "close chapter" at the passing of the statute having afterwards died, the bishop claimed under the statute to appoint direct to the vacant canonry residentiary. The prælector claimed to succeed to the vacancy on the ground that several who were members of the general chapter at the passing of the act were still members:—The court held, that "chapter" meant the "close chapter," for that it was the intention of the statute to preserve the vested rights of patronage alone, without any regard to the rights of the body out of which the selection was to be made; and the residentiary canonries therefore were now in the direct patronage of the bishop (*p*).

Canons of
Ripon and
Manchester to
be appointed
by the respec-
tive bishops.

Sect. 26. "In the cathedral church of Ripon the canonries shall from henceforth be in the patronage of the Bishop of Ripon for the time being, and not of the Archbishop of York, and it shall not be necessary for the person to be appointed a canon in the said church to be nominated by the chapter thereof; and the Bishop of Ripon for the time being shall be the visitor of the said chapter, and not the said Archbishop of York; and in the collegiate church of Manchester, so soon as the see of Manchester shall have been founded, and every person who shall be a member of the said chapter at the passing of this act shall have ceased to be such member, the canonries shall be in the direct patronage of the Bishop of Manchester for the time being, who may, upon the vacancy of any canonry, collate thereto a spiritual person, who shall thereupon be entitled to installation as a canon of the said last-mentioned church."

Repeal of
statutes and
customs for
appropriating
separate
estates.

Sect. 28. "In every cathedral or collegiate chapter wherein there exists any statute or custom for assigning to the dean or to any canon any land, tithes or other hereditament, in addition to his share of the corporate revenues, or for appropriating separately to the dean or any canon during his incumbency, the proceeds of any land, tithes, or other hereditament, part of the corporate property of the chapter, every such statute and custom, or every such part thereof as relates to such assignment or appropriation, shall be repealed and annulled as to all deans and canons hereafter appointed: Provided nevertheless, that

any small portion of land situate within the limits and precincts of any cathedral or collegiate church, or in the vicinity of any residentiary house, may be reserved to such church, or permanently annexed to such residentiary house, by the authority hereinafter provided."

By sect. 29, "The rectory of the parish of Saint Margaret, in the city of Westminster," and "the rectory of the parish of Saint John, in the said city," were to "immediately become and be permanently annexed and united" to two canonries in the same church thereby specified, "and the said parishes shall become and be part of the province of Canterbury, of the diocese of London, and of the archdeaconry of Middlesex; and the said parishes, and the rectors and other ministers and officers thereof shall, in ecclesiastical matters, be subject only to the jurisdiction of the Archbishop of Canterbury (q), the Bishop of London, and the Archdeacon of Middlesex respectively, in the same manner as other parishes in the said province, diocese, and archdeaconry are respectively subject thereto, and be exempted and relieved from all other ecclesiastical jurisdiction whatsoever. . . ."

Annexation of St. Margaret's and St. John's to two canonries of Westminster.

Sect. 30 has provisions as to the rectory house of Saint Margaret.

Sect. 31 provides for the division and application of the revenues of the two canonries of Westminster.

By sect. 41, "Subject to the provisions hereinafter contained, the patronage of all benefices with cure of souls possessed by deans and other individual members of chapters in right of any separate estates held by them as such members, or possessed by prebendaries, dignitaries, or officers not residentiary, in right of their prebends, dignities, or offices respectively, shall be transferred to and vested in the respective bishops of the dioceses in which the benefices shall be respectively situate, subject nevertheless to all such provisions respecting the apportionment or exchange of ecclesiastical patronage as are contained in the first hereinbefore-recited act." Then particular provisions follow as to Southwell and the Bishops of Ripon and Manchester.

Separate patronage of members of chapters to be vested in the bishops.

Sect. 49. "All the profits and emoluments of each and every canonry suspended by or under the provisions of this act, whether consisting of or arising from rents, fines, compositions, dividends, stipends, or other emoluments whatsoever, shall forthwith, as to every such canonry vacant at the passing of this act, and as to every other immediately upon and from the vacancy thereof, and from time to time be paid to the ecclesiastical commissioners for England for the purposes of this act, in like manner as the holder of such canonry, if he had remained in possession, or the successor thereto, if a successor had been appointed and had duly qualified himself by residence and otherwise according to the statutes and usages of his church to receive his full portion of the emoluments thereof, would have been entitled to receive

Profits of suspended canonries to be paid to and their estates vested in the commissioners.

(q) See *Combe v. De la Bere*, 22 Ch. D. p. 316.

the same; and all the estate and interest, if any, which such successor would have had in any lands, tithes, and other hereditaments (except any right of patronage) annexed or belonging to or usually held and enjoyed with such canonry, or whereof the rents and profits have been usually taken and enjoyed by the holder of such canonry, as such holder separately and in addition to his share (if any) of the corporate revenues of such chapter, shall forthwith, as to all vacancies subsisting at the passing of this act, and as to all others immediately upon such vacancies respectively, accrue to and be vested absolutely in the ecclesiastical commissioners for England and their successors for the purposes of this act, without any conveyance thereof or any assurance in the law other than the provisions of this act (r). Provided nevertheless, that the profits and emoluments arising from corporate revenues belonging to the canonries suspended in the chapters of the cathedral churches of Chester, Lichfield and Ripon respectively shall become, as the vacancies occur, part of the divisible corporate revenues of the said chapters respectively: provided also, that nothing herein contained shall be construed to affect the right of any chapter, according to the statutes or customs of such chapter in force at the passing of this act, to make due provision out of the divisible corporate revenues for the maintenance of the fabric, the support of the grammar school, if any, and all other necessary and proper expenditure" (s).

Separate estates of deaneries and canonries not suspended to vest in commissioners.

Sect. 50. "Subject to the provisions herein contained, all the estate and interest which the holder of any deanery or canonry not suspended by or under the provisions of this act, and his successors, have and would have in any lands, tithes, and other hereditaments or endowments whatsoever annexed or belonging to or usually held or enjoyed with such deanery or canonry (except any right of patronage), or whereof the rents and profits have been usually taken and enjoyed by the holder of such deanery or canonry as such holder separately and in addition to his share of the corporate revenues of such chapter, shall, without any conveyance or assurance in the law other than the provisions of this act, accrue to and be vested absolutely in the ecclesiastical commissioners for England, and their successors, for the purposes of this act."

Estates of non-residentary prebends, &c., vested in commissioners.

Sect. 51. "All lands, tithes, and other hereditaments, excepting any right of patronage, and all other the emoluments and endowments whatsoever belonging to the deaneries of Wolverhampton, Middleham, Heytesbury, and Brecon, and to the dignity or office of sub-dean, chancellor of the church, vice-chancellor, treasurer, provost, precentor, or succentor, and to any

(r) The ecclesiastical commissioners are entitled to no greater rights than the former canons were. *A.-G. v. Dean and Canons of Windsor*, 4 Jur., N. S. p. 818; 24

Beav. p. 679.

(s) See *Repton v. Hodgson*, 3 H. L. p. 72, as to the profits of a suspended canonry.

prebend not residentiary in any cathedral or collegiate church in England, or in the cathedral churches of Saint David's and Llandaff, or in the collegiate church of Brecon, or enjoyed by the holder of any such deanery, dignity, office, or prebend as such holder, shall, as to all such of the said deaneries, dignities, offices, and prebends respectively as may be vacant at the passing of this act immediately upon so passing, and as to all others immediately upon the vacancies thereof respectively, without any conveyance or assurance in the law other than the provisions of this act, accrue to and be vested absolutely in the ecclesiastical commissioners for England and their successors for the purposes of this act: provided always, that all other rights and privileges whatsoever now by law belonging to any of such dignities, offices or prebends, except the said last-named deaneries, shall continue to belong thereto, except so far as any of such rights or privileges may be controlled or affected by any of the provisions of this act, respecting the right of election now exercised by any chapter: provided always, that nothing herein contained shall in any manner apply to or affect any dignity, office or prebend, which is permanently annexed to any . . . (t) arch-deaconry, professorship or lectureship, or to any school, or the mastership thereof, or the prebends of Burgham, Bursalis, Exceit and Wyndham, in the cathedral church of Chichester."

By 13 & 14 Vict. c. 94, s. 20, the estates of these excepted prebends may be vested with consent of the patrons in the ecclesiastical commissioners on their undertaking to pay an annual income instead thereof to the prebendaries (u).

By 3 & 4 Vict. c. 113, s. 52, "so much and such parts of the lands, tithes, or other hereditaments annexed or belonging to or usually held and enjoyed with the respective deaneries or any of the dignities or canonries of the cathedral churches of York, Chichester, Exeter, Hereford, Lichfield, Salisbury and Wells respectively, or belonging to the prebends not residentiary in such churches, as may be deemed proper, shall, by the authority hereinafter provided, be from time to time, upon the vacancies of the said respective deaneries, dignities, prebends or offices transferred to and vested in the chapters of the said last-mentioned churches respectively, so as to augment the divisible corporate revenues of such chapters, or be applied by the like authority to make such provision for the deans of the said cathedral churches respectively as by the like authority shall be deemed just and proper."

Proviso
respecting
separate
estates.

Sections 61, 63 and 64 make provisions as to the prebends of Chulmleigh, the prebends in the cathedral church of Lichfield, and the endowments of Wolverhampton, Heytesbury, and Middle-

(t) The word "bishopric" was in this section, but the effect of 36 & 37 Vict. c. 64, s. 3, is to strike it out.

(u) See *Reg. v. Champneys*, L. R., 6 C. P. p. 384, and Part IX., Chap. III.; and see 36 & 37 Vict. c. 64.

ham; and the endowments of Wimborne Minster, which it is not proposed to set out at length.

Augmenta-
tion of certain
smaller
dignities
from surplus
revenues of
certain larger
dignities.

By sect. 66. "So soon as conveniently may be, and by the authority hereinafter provided, and subject to the provisions herein contained respecting the university of Durham and the canonries in the collegiate church of Westminster annexed to the rectories of Saint Margaret and Saint John, such fixed annual sums shall be determined on to be paid, and shall accordingly be paid to the ecclesiastical commissioners for England, by the deans and canons of the cathedral churches of Durham and Saint Paul in London, and the collegiate churches of Westminster (x), as, after due inquiry, and a calculation of the present average annual revenues of the chapters of such churches respectively, shall leave to the dean of Durham an average annual income of three thousand pounds, and to the deans of Saint Paul's, Westminster (x), respectively an average annual income of two thousand pounds, and to the canons of the said four last-mentioned churches respectively the average annual income of one thousand pounds; and such other annual sums shall be determined on to be paid, and shall be accordingly paid, by the said commissioners, or such deductions shall be allowed to be made out of the proceeds of any suspended canonry or canonries, as, after like inquiry and calculation, shall give to the dean of every cathedral and collegiate church in England an average annual income of one thousand pounds, and to the deans of Saint David's and Llandaff respectively an average annual income of seven hundred pounds, and to the respective canons of every cathedral church in England an average annual income of five hundred pounds, and to the canons of the said churches of Saint David and Llandaff an average annual income of three hundred and fifty pounds, and as shall also enable the respective chapters of Chester and Ripon to provide for the efficient performance of all the duties of the said churches and the maintenance of the fabrics thereof."

Mode of
applying the
revenues at
the disposal
of the com-
missioners.

By 3 & 4 Vict. c. 113, s. 67, "Except as herein otherwise specified, all the monies and revenues to be paid to the ecclesiastical commissioners for England, and all the rents and profits of the lands, tithes, and other hereditaments vested and to be vested in them the said commissioners by and under the authority of this act, together with all accumulations of interest produced by and arising therefrom, shall be from time to time carried over by the said commissioners to a common fund, and by payments or investments made out of such fund, or, if in any case it be deemed more expedient, by means of an actual conveyance and assignment of such lands, tithes, or other hereditaments, or of a portion thereof, additional provision shall be made, by the authority hereinafter provided, for the cure of souls in

(x) There were provisions as to Manchester; but they are repealed by 37 & 38 Vict. c. 96.

parishes where such assistance is most required, in such manner as shall, by the like authority, be deemed most conducive to the efficiency of the Established Church: Provided always, that in making any such additional provision out of any tithes, or any lands or other hereditaments allotted or assigned in lieu of tithes, so vested or to be vested in the said commissioners, or out of the rents and profits thereof, due consideration shall be had of the wants and circumstances of the places in which such tithes now arise or have heretofore arisen."

Sect. 68. "By the authority hereinafter provided, and for the purpose of fully carrying into effect any of the provisions of this act or of the said first-recited act, any sum of money which shall have been invested in the public funds, or in other security or securities, in trust for any ecclesiastical body corporate, aggregate or sole, may, upon an application in writing to the ecclesiastical commissioners for England, under the hand and seal of such body corporate, and in the case of any chapter, with the consent of the visitor thereof, be directed to be sold, and the same shall be sold accordingly; and the produce of such sale shall be applied to such purpose and in such manner as shall appear most conducive to the permanent benefit of such body corporate; and also, for any like purpose, and by the like authority, any arrangement may from time to time be made, with the consent in writing under the corporate seal of any bishop or chapter, for the sale, transfer, or exchange of any lands, tithes, or other hereditaments belonging to the see of such bishop, or to such chapter, or for the purchase of other lands, tithes, or other hereditaments in lieu thereof, or for substituting in any case any lands, tithes, or other hereditaments for any money payment."

Special arrangements, with consent of bishop or chapter.

The non-residentiary prebendaries of cathedrals have not ceased to be members of the chapters since the passing of 3 & 4 Vict. c. 113, and consequently have still a right to vote at the elections of proctors to represent the chapters in convocation (*y*).

Right of prebendary to vote in election of proctors.

By 13 & 14 Vict. c. 98, s. 6, no head ruler of any college or hall at Oxford or Cambridge, and no warden of the university of Durham, who also holds a benefice, may take and hold any cathedral preferment, unless either such cathedral preferment or such benefice are attached to and form part of his emoluments as head or warden.

Collegiate and cathedral preferments not to be held together.

A special act, 6 & 7 Vict. c. 77, was passed as to the cathedral churches in Wales: by this Act it is provided that there shall be four canons residentiary for each cathedral (the number had been reduced to two at Llandaff and St. David's by 3 & 4 Vict. c. 113) (*z*). Two canonries in each cathedral are to be annexed to archdeaconries (*a*). The incomes of the deans and canons are to be the same in St. Asaph and Bangor as those already given

Welsh chapters.

(*y*) *Randolph v. Milman* (1868),
L. R., 4 C. P. p. 107.

(*z*) 6 & 7 Vict. c. 77, s. 2.

(*a*) *Ibid.* s. 3.

by 3 & 4 Vict. c. 113, s. 66, to Llandaff and St. David's, and are to be augmented to this measure out of the common fund (*b*). The deans are to be heads of their chapters (*c*). All the provisions of 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39, are to extend to St. Asaph and Bangor (*d*). Houses of residence are to be provided (*e*); archdeacons are to be severed from bishoprics and deaneries (*f*); and provision is to be made out of the Welsh lands and tithes in the hands of the commissioners for Welsh clergymen to preach in London (*g*). By 16 & 17 Vict. c. 82, several provisions are made for the College of Christ at Brecknock.

As to honorary canonries the enactments are :

Foundation
of honorary
canonries.

3 & 4 Vict. c. 113, s. 23. "And whereas it is expedient that all bishops should be empowered to confer distinctions of honour upon deserving clergymen, be it enacted, That honorary canonries shall be hereby founded in every cathedral church in England in which there are not already founded any non-residentiary prebends, dignities or offices; and the holders of such canonries shall be styled honorary canons, and shall be entitled to stalls, and to take rank in the cathedral church next after the canons, and shall be subject to such regulations respecting the mode of appointment, and otherwise, as shall be determined on by the authority hereinafter provided, with the consent of the chapters of the said cathedral churches respectively; and the number of such honorary canonries hereby founded in each cathedral church shall be twenty-four; and it shall be lawful for the archbishops and bishops respectively, if they shall think fit, from time to time, to appoint spiritual persons to such honorary canonries; provided that not more than eight of such honorary canons shall be appointed in any diocese within the year next after the passing of this act, nor more than two in any subsequent year, except in the case of the vacancy of any honorary canonry by death, resignation, or otherwise; provided also, that no emolument whatever, nor any place in the chapter of any cathedral church shall be taken or held by any honorary canon in virtue of his appointment as such canon."

Cathedrals in
which hono-
rary canonries
are founded.

It is further enacted by 4 & 5 Vict. c. 39, s. 2, "For the removal of all doubts respecting the foundation of honorary canonries, that honorary canonries are and shall be founded forthwith in the cathedral churches of Canterbury, Bristol, Carlisle, Chester, Durham, Ely, Gloucester, Norwich, Oxford, Peterborough, Ripon, Rochester, Winchester, and Worcester, and in the collegiate church of Manchester so soon as the same shall become a cathedral church, and in no other cathedral church: and that all the provisions of the secondly-recited

(*b*) 6 & 7 Vict. c. 77, s. 6.

(*c*) Ibid. s. 4.

(*d*) Ibid. s. 1.

(*e*) Ibid. s. 7.

(*f*) Ibid. ss. 8, 9.

(*g*) Ibid. s. 12.

act (*h*) which purport to relate to honorary canonries shall apply to the honorary canonries so founded."

Sect. 3. "The holding of an honorary canonry, or of any prebend, dignity, or office, not now in any manner endowed, or whereof the lands, tithes, or other hereditaments, endowments, or emoluments shall have been vested in the ecclesiastical commissioners for England, or which may hereafter be endowed to an amount not exceeding twenty pounds by the year, shall not be construed to prevent the holding therewith of more benefices than one . . . and every such prebend, dignity, or office, which shall hereafter become vacant, and every such honorary canonry shall in like manner be and remain in the patronage of the archbishop or bishop of the diocese for the time being until a successor shall be collated thereto; any royal prerogative, statute, canon, or usage to the contrary notwithstanding."

Honorary preferment may be held with two benefices, and shall not be subject to lapse.

By 13 & 14 Vict. c. 98, s. 11, the provisions of this section are extended "so as to authorize the holding of one benefice and one cathedral preferment in the same church with such honorary canonry, prebend, dignity or office."

Honorary canons in the new cathedrals are dealt with in sect. 4 of this chapter.

As to minor canons the enactments are:

3 & 4 Vict. c. 113, s. 45. "From henceforth the right of appointing minor canons shall be in all cases vested in the respective chapters, and shall not be exercised by any other person or body whatsoever; and so soon as conveniently may be, and by the authority hereinafter provided, regulations shall be made for fixing the number and emoluments of such minor canons in each cathedral and collegiate church; provided that there shall not in any case be more than six nor less than two; and the stipend of each such minor canon hereafter to be appointed shall not be less than one hundred and fifty pounds per annum; and arrangements may from time to time be made by the like authority for securing to any minor canon not otherwise competently provided for such annual sum as shall make up to him an income as minor canon, not exceeding in any case the said sum of one hundred and fifty pounds."

Minor canons to be appointed by the chapters.

Sect. 46. "No minor canon hereafter to be appointed in any cathedral or collegiate church shall be allowed to take and hold together with his minor canonry any benefice beyond the limit of six miles from such church."

Their number and salary.

Minor canons not to hold any benefice beyond six miles.

It is enacted by sect. 15 of 4 & 5 Vict. c. 39:

"Notwithstanding any thing in the secondly-recited act contained, any minor canon in any cathedral or collegiate church may take and hold, together with his minor canonry, any benefice which is within the distance prescribed by the said act; and in every case in which any dean before the passing of the same act enjoyed a right, as such dean, to appoint any minor

Amendments relating to minor canons.

canon, nothing therein contained shall be construed to deprive him or his successors thereof; and, in the construction of the same act and of this act, the term 'minor canon' shall not be construed to extend to or include any other than a spiritual person."

Returning to 3 & 4 Vict. c. 113, it is enacted by s. 93, that "the term 'minor canon' shall be construed to extend to and include every vicar, vicar-choral, priest vicar, and senior vicar, being a member of the choir in any cathedral or collegiate church."

Provision for vesting the estates of the minor cathedral corporations in the ecclesiastical commissioners is made by 27 & 28 Vict. c. 70. By 29 & 30 Vict. c. 111, s. 18, the commissioners are enabled in certain cases to raise the salaries of minor canons, vicars-choral, and lay clerks.

There is a special act for the minor canons of St. Paul's, 38 & 39 Vict. c. lxxiv.

The provisions in the acts 3 & 4 Vict. c. 113, and 4 & 5 Vict. c. 39, as to new and old archdeaconries, their estates, and the annexation of canonries to them, as to new rural deaneries, residence houses and certain hospitals, benefices and their augmentations, sinecure preferments, exchange of advowsons, consent of patrons, are treated of hereafter, in their appropriate places.

As to cathedral fabrics, the following important enactment as to their sustentation should be noticed:

3 & 4 Vict. c. 113, s. 53, "In any cathedral church on the old foundation in which any contribution to the fabric fund of such church has heretofore, either usually or occasionally, been made out of the rents, profits or proceeds of any lands, tithes or other hereditaments so vested or to be vested in the ecclesiastical commissioners for England, it shall be lawful for the said commissioners to contribute to such fund such sum as they shall deem necessary out of the rents, profits or proceeds of the same lands, tithes or other hereditaments, not exceeding in amount the proportion of such rents, profits or proceeds which has usually been applied to like purposes."

By 23 & 24 Vict. c. 69, the ecclesiastical commissioners are especially empowered to contribute to the restoration of Manchester Cathedral.

By 51 & 52 Vict. c. 11, special provisions are made as to Westminster Abbey, establishing a fabric fund to which the ecclesiastical commissioners may give 10,000*l.*, temporarily suspending one canonry, and providing that the estates of the dean and chapter may be re-transferred to the commissioners.

By 31 Vict. c. 19, the transference of the estates of several deans and chapters to the ecclesiastical commissioners is confirmed; and by 31 & 32 Vict. c. 114, the commissioners are empowered in like manner to take over by scheme, confirmed by Order in Council, the estates of the other deans and chapters (*i.*).

(*i.*) See these acts treated at length in Part IX., Chap. III., *infra*.

SECT. 4.—*The Provisions as to the new Cathedrals.*

It seems necessary to give a special section to the new cathedrals and cathedral bodies belonging to the new bishoprics founded in the later years of the reign of her present Majesty.

Later cathedrals founded in present reign.

The bishoprics of Ripon and Manchester contained within their limits collegiate churches, which it was easy to turn into cathedrals when those bishoprics were founded at the beginning of the present reign. But the later bishoprics of Truro, St. Albans, Liverpool, Newcastle, Southwell and Wakefield had no such foundations for cathedral bodies. Liverpool and Wakefield have not even, and Truro had not, church fabrics of sufficient majesty to be converted into Cathedrals.

The provisions in the original acts for creating these later bishoprics are pretty nearly alike.

A bishopric endowment fund was created, to be vested in and administered by the ecclesiastical commissioners (*k*).

The trusts of this fund were, after providing for the income of the bishop and his house of residence, declared to be "for the foundation of a dean and chapter for the bishopric" "in such manner as may be from time to time provided by Order in Council" (*l*).

Till the foundation of a dean and chapter the bishop is to be appointed by royal letters patent, and the ecclesiastical commissioners are to make arrangements "for dispensing with the confirmation or agency of a dean and chapter in relation to any matter in which such confirmation or agency would be required" (*m*).

The ecclesiastical commissioners may also, in their scheme to be approved by Order in Council, provide "for founding honorary canons in the cathedral church, with power to dispense with the consent of any dean and chapter so long as there is no such dean and chapter in existence." The commissioners might also provide that honorary or non-residentiary canons of the mother church who had benefices in the new diocese should become instead honorary canons of the new cathedral (*n*).

Truro, Newcastle and Liverpool have since then obtained special acts with regard to their cathedral chapters.

Special provisions. Truro.

Truro has had two acts for this purpose. The first (41 & 42 Vict. c. 44) provides for the suspension of a canonry in Exeter

(*k*) 38 & 39 Vict. c. 34, s. 2; 39 & 40 Vict. c. 54, s. 2; 41 & 42 Vict. c. 68, s. 2.

(*l*) 38 & 39 Vict. c. 34, s. 13; 39 & 40 Vict. c. 54, s. 8; 41 & 42 Vict. c. 68, s. 8. In this last act there is an intermediate charge upon the fund in favour of the bishopric which has contributed out of its

income to the foundation of the new bishopric.

(*m*) 38 & 39 Vict. c. 34, ss. 8, 9; 39 & 40 Vict. c. 54, ss. 6, 7; 41 & 42 Vict. c. 68, ss. 6, 7.

(*n*) 38 & 39 Vict. c. 34, s. 9 (6); 39 & 40 Vict. c. 54, s. 7 (6); 41 & 42 Vict. c. 68, s. 7 (6).

Cathedral upon the first vacancy, and the transfer of its endowment, except the house of residence, to the dean and chapter of Truro, or the Truro Chapter Endowment Fund—a fund which is apparently thereby created—provides further for the establishment of residentiary canons before the foundation of a dean and chapter, and for making cathedral statutes, and fixes the minimum income of the dean and canons.

The second Act (50 & 51 Vict. c. 12) draws the limits between the old parish church and the new cathedral, constitutes the bishop (temporary dean), the rector of the parish (sub-dean), and honorary canons holding certain offices (whom the bishop may make into canons residentiary) the dean and chapter of Truro; and provides for the regulation of the patronage of benefices belonging to the dean and chapter.

Newcastle.

The Newcastle Act (47 & 48 Vict. c. 33) provides for the transfer of a canonry in Durham Cathedral (being that annexed to the archdeaconry of Northumberland) and its endowment, except the house of residence, to the dean and chapter of Newcastle, or to the Newcastle Chapter Endowment Fund—a fund which is apparently thereby created—provides further (like the first Truro Act) for the establishment of residentiary canonries before the foundation of a dean and chapter, and for making cathedral statutes, and fixes the minimum income of the dean and canons.

Liverpool.

Liverpool has had a private act (48 & 49 Vict. c. li.) which provides for the erection of a cathedral on the site of the church and churchyard of St. John in the parish of Liverpool, and enacts that upon this cathedral being opened for divine service the church of St. Peter (constituted the cathedral by Order in Council of March 24, 1880) shall cease to be the cathedral.

This act also provides for the foundation of a dean and chapter, and until that foundation for the establishment of one or more canons residentiary.

This proposed cathedral has not yet been begun.

Bristol.

Bristol, if it should be constituted a separate diocese, has its dean and chapter ready to hand.



SECT. 5.—*Resignation of Dean and Canons.*

This is provided for by the statute 35 & 36 Vict. c. 8: the material provisions of which are as follows:

Definitions :

“Dean;”

Sect. 2. “In this act—

‘Dean’ means a dean of a cathedral or collegiate church in England or Wales:

“Canon;”

‘Canon’ means a canon or minor canon of a cathedral or collegiate church in England or Wales, but does not include an honorary canon:

‘Bishop,’ in the case of the diocese of Canterbury, means “Bishop.” the Archbishop of Canterbury, and in the case of the diocese of York, means the Archbishop of York.”

Sect. 3. “On a representation being made to the bishop of the diocese by any dean or canon that he is desirous of resigning his deanery or canonry by reason that he is incapacitated by age or some mental or permanent physical infirmity from the due performance of his duties, such bishop shall, if satisfied of the incapacity of the dean or canon by whom the representation is made, certify such incapacity, in writing under his hand, to her Majesty, the archbishop, bishop, body corporate, or person in whom the patronage of the deanery or canonry held by such dean or canon is vested, and from and after the date of such certificate such deanery or canonry shall be vacant, and such vacancy may be filled up in the same manner and with the same incidents in all respects as if such dean or canon were dead, with the exception following; that is to say,

Provision for resignation of incapacitated deans and canons on application to bishop.

There shall be paid, by the year, to the retiring dean or canon, by the treasurer or other proper officer of the chapter to which the dean or canon belongs, out of the income of the deanery or canonry, and as a first charge thereon in the hands of the successor, one-third part of the income, calculated on an average of the three preceding years, received by the retiring dean or canon before his retirement on account of his deanery or canonry, such yearly sum to accrue due from day to day, but to be payable half-yearly: Provided that if the retiring dean or canon holds no other ecclesiastical preferment, such one-third shall, in the case of a dean in England, if less than four hundred pounds a year, be made up to four hundred pounds a year; and in the case of a dean in Wales, if less than three hundred pounds a year, be made up to three hundred pounds a year; and in the case of a canon not being a minor canon in England, if less than two hundred and fifty pounds a year, be made up to two hundred and fifty pounds a year; and in the case of a canon not being a minor canon in Wales, if less than one hundred and seventy-five pounds a year, be made up to one hundred and seventy-five pounds a year.”

Sect. 4. “When a representation has been made to a bishop by a dean or canon of his desire to resign, the bishop may, if he in his discretion thinks it expedient so to do for the purpose of satisfying himself of the incapacity of such dean or canon, direct an inquiry to be held into the existence of such incapacity by any number of persons not exceeding three, being beneficed clergymen, or holding a rank in the church higher than that of beneficed clergymen, and he may give or withhold his certificate according to the result of such inquiry.

Power to bishop to direct inquiry into incapacity of dean or canon.

“The person or persons directed by the bishop to make an

inquiry into the incapacity of a dean or canon shall give notice to such dean or canon of a time and place at which the inquiry will be made, and any person authorized by or on behalf of such dean or canon may attend the inquiry, and produce evidence and cross-examine the witnesses, and generally conduct the case on behalf of the dean or canon. The person or persons conducting the inquiry, or any of them, may administer an oath and may examine witnesses on oath or not, in writing or orally, as he or they think expedient; and any person when examined as aforesaid who wilfully makes a false statement, whether on oath or not, shall be guilty of a misdemeanor. Any person refusing to give evidence when required, after a tender of his reasonable expenses, may be certified by any person or persons conducting such inquiry to have so refused to any judge of one of her Majesty's superior courts of law or equity, and such judge may deal with such person in the same way as if he had refused to give evidence in a proceeding instituted in the court of which he is judge."

Special provision as to dean or canon found by process of law to be of unsound mind.

Sect. 5. "If any dean or canon has been found by due process of law to be a lunatic or of unsound mind, the bishop of the diocese may if he think fit grant a certificate of the incapacity of such dean or canon without any representation being made by him of such incapacity, and such certificate shall for the purposes of this act have the same effect as if it had been granted in pursuance of a representation of incapacity made by the dean or canon: Provided that no such certificate shall be granted where the deanery or canonry held by the person so found to be a lunatic or of unsound mind is annexed to the headship of a college or professorship of any university so long as provision shall be made to the satisfaction of the bishop for performing the duties of the said deanery or canonry."

As to expenses of an inquiry if directed by bishop.

Sect. 6. "The reasonable expenses of any inquiry under this act into the incapacity of a dean or canon shall be certified under the hands of any person or persons authorized to conduct the inquiry, and when so certified and approved by the bishop shall be defrayed out of the income of the retiring dean or canon."

Vacancy in deanery or canonry to create a vacancy in any annexed preferment.

Sect. 7. "Where any professorship, archdeaconry, headship, or other preferment, ecclesiastical or civil, is annexed to any deanery or canonry, or any deanery or canonry is annexed to any professorship, archdeaconry, headship, or other preferment, ecclesiastical or civil, the dean or canon retiring from his deanery or canonry in pursuance of this act shall be deemed to have vacated also such professorship, archdeaconry, headship, or other preferment, and shall be entitled to be paid out of the income of such preferment, and as a first charge thereon in the hands of the successor, by the treasurer or other officer whose duty it is to pay such income, one-third part of the income, calculated on an average of the three preceding years, received therefrom by

the retiring dean or canon before his retirement on account of such preferment, such yearly sum to accrue due from day to day, but to be payable half-yearly: Provided that where any such dean or canon would (if this act had not passed, and he had vacated or become incapable of performing the duties of any such professorship, archdeaconry, headship, or other preferment), have been entitled to any other payment in respect of such preferment than that to which he is entitled under this section, such payment shall be substituted for the one-third awarded to him hereby.

By sect. 8, the Archbishop of Canterbury, "acting on behalf of her Majesty," is to act as bishop for Christchurch, Oxford, Windsor, and Westminster.

CHAPTER V.

ARCHDEACONS.

SECT. 1.—*Under the Old Law.*2.—*Under Modern Statutes.*

THE ancient and important office of archdeacon (*a*) must now be considered under two heads: First, under the old law; Secondly, under the recent law.

SECT. 1.—*Under the Old Law.*

Primitive
office of
archdeacon.

Though archdeacons in these latter ages of the church have usually been of the order of presbyters, yet anciently they were no more than deacons. So Hieronymus, *epistola cxlvi., ad Evagr.* “*aut diaconi eligant de se quem industrium noverint et archidiaconum vocent*” (*b*). He was the principal deacon, as the archpresbyter was the principal presbyter of each church. It is matter of great dispute whether he was elected by the deacons or appointed by the bishop; but it would seem that he was usually a person possessing such influence in the Church as to be chosen the bishop’s successor. The primitive offices of the archdeacon may be all enumerated under five heads. First, to attend the bishop to the altar and to order all things relating to the inferior clergy and the ministrations in the church. Secondly, to assist the diocesan in the distribution and management of the ecclesiastical revenues. Thirdly, to assist him also in preaching; for as any deacon was authorized to preach by the bishop’s leave, so the archdeacon, being the most eminent of the deacons, was more frequently selected for the discharge of this duty. Fourthly, he also bore a part with the bishop in the ordination of the inferior clergy; such as subdeacons, acolythists, &c. Fifthly, the archdeacon was also invested with authority to censure the inferior clergy, but not the presbyters, that is to say, not in the first ages of the Church. But some time before the compilation of the *Decretum* by Gratian, the practice of

(*a*) God. c. viii. Of Archdeacons; Bingham, *Orig. Eccl.*; Stillingfleet, *Miscellaneous Discourses*, Disc. xiv. p. 242; Wilkins, *Concilia*, vol. i.

(*b*) *Opera Omnia*, vol. i. p. 1076 (ed. 1734), numbered ep. 85 in original edition.

choosing archdeacons from the order of presbyters had begun. So also it appears doubtful whether the archdeacon's power anciently extended over the whole diocese or was confined to the city or mother church. During the middle ages of the Church it was undoubtedly co-extensive with the diocese. Isidorus Hispalensis, who lived at the beginning of the seventh century, describes his office as follows (c): "*Sollicitudo quoque parochiarum et ordinatio et jurgia ad ejus pertinent curam. Pro reparandis diocesanis basilicis ipse suggerit sacerdoti. Ipse inquirat parochias cum jussione episcopi et ornamenta vel res basilicarum parochiarum gesta libertatum episcopo idem refert.*" As deacons were called the eyes, ears and mouth of the bishop (d), so the archdeacon was called the "*oculus Episcopi*," as he is designated in the Decretals (e), and by the Council of Trent (f), as well as by more ancient authors.

The origin of this office is lost in great obscurity, and its exact date has been the subject of much dispute. All that can be alleged with certainty seems to be, that inasmuch as it is mentioned by St. Jerome and other writers of the fourth century, it must have been instituted before that period. Stillingfleet says, "By the 4th council of Toledo the bishop was to visit his whole diocese parochially every year. The Gloss saith, if there were occasion for it; and that the bishop may visit as often as he sees cause; but if he be hindered, the canon saith, he may send others (which is the original of the archdeacon's visitation) to see not only the condition of churches, but the lives of the ministers" (g). The early ecclesiastical records of our own country mention the archidiaconal dignity as a part of the cathedral constitution. The archdeacons are described as members of the chapter, whose particular office it was to assist the bishop in the exterior government of the Church, while the duty of others, such as the dean and chancellor, was connected with their residence in the cathedral (h). Thus the chapter of Lincoln is said to have been transplanted by Remigius, Bishop of Lincoln, from Dorchester, who placed there a dean, treasurer, precentor, and eight archdeacons (i). In Salisbury, a narrower diocese, there were four archdeacons. "*Quatuor itaque sunt persone principales in ecclesiâ Sarisburiensi: decanus, cantor, cancellarius, thesaurarius, quatuor archidiaconi*," &c. (k). When Bishop Douglas, of Moray in Scotland, erected the church of Spyny into the cathedral church of Moray, he wrote to the dean and chapter of

(c) Opera Omnia, vol. vi. p. 559, ep. ad Leudefredum.

(d) X. i. 23, de officio Archidiaconi; Lind. p. 49; Const. Apost. lib. ii. c. 44, l. 3, c. 19.

(e) X. i. 23, 7.

(f) Sess. 24, c. 12.

(g) Eccl. Cases, vol. i. p. 76.

(h) See stat. Lichfield, A.C. 1194; Wilkins, Concilia, vol. i. pp. 407,

408. "Archidiaconi officiales sunt episcopi, quorum officium in extra minoribus administrationibus consistit." Ibid. p. 499.

(i) Henry of Huntingdon, Rolls Series, 1879, pp. 301, 302. See also Wharton, Anglia Sacra, vol. i. p. 150.

(k) Wilkins, Concilia, vol. i. p. 741.

Lincoln for advice, in obedience to which he appropriated one canonry to an archdeacon. "*Investietur autem archidiaconus et installabitur in predictâ canonîâ sicut simplex canonicus in ecclesiâ Lincoln*" (*l*). The archdeacons were empowered to hold rural chapters and elect rural deans (*m*), and at such rural chapters they communicated to the clergy the canons enacted by the bishop with the consent of the chapter.

It seems that longer leave of absence from his cathedral was granted to an archidiaconal canon on account of the particular nature of his duties (*n*). When the see and cathedral church of Peterborough was founded by Henry VIII., the charter expressly states that the archdeacon of Northampton, now removed from the diocese of Lincoln to that of Peterborough, should have the same place in the new cathedral which he had held in that of Lincoln (*o*). The laxer practice of modern times allowed archdeacons to be prebendaries of cathedrals in another diocese, and to reside at a considerable distance from that over which they presided. Nor are there wanting instances where archdeacons hold no cathedral appointment in any diocese. By the canon law (*p*), a person may have a prebend in one church, and a prebend in another, but not an archdeaconry in two churches at one and the same time.

The archdeacon, being always near the bishop, and the person mainly entrusted by him, grew into credit and power, and came by degrees (as occasion required) to be employed by him, in visiting the clergy of the diocese, and in the despatch of other matters relating to the episcopal care: so that by the beginning of the seventh century, he seems to have been fully possessed of the chief care and inspection of the diocese, in subordination to the bishop (*q*).

But this is to be understood with a twofold distinction from the present state and measure of archidiaconal power; 1. That he was employed generally throughout the diocese, at the pleasure of the bishop (*r*). Such an archdeacon John de Athon calls the general archdeacon, who has not an archdeaconry distinctly limited, but supplies the place of the bishop as his vicar universally, by way of distinction from that archdeacon who has a distinct limitation of his archdeaconry, and a separate jurisdiction from that of the bishop. And the first of these is the archdeacon that we find described in the body of the canon law. 2. That the power of the archdeacons in that ancient state was chiefly a power of inquiry and inspection, which Lindwood calls a simple inquiry, where, he says, that of common right the archdeacon

(*l*) Wilkins, Concilia, vol. i. p. 532.

(*m*) See Ayl. Par. p. 99, and Aliæ Constit. Ægidii Sarisbur. Episcop. A.D. 1256; Wilkins, Concilia, vol. i. p. 715.

(*n*) Wilkins, Concilia, vol. i. p. 557.

(*o*) Dugdale, Mon. Anglic. Peter-

borough, p. 403; Rymer, Fœdera, vol. ii. p. 731.

(*p*) X. iii. 5, 14.

(*q*) Gibs. p. 969.

(*r*) Chiverton v. Trudgeon, 2 Roll. p. 150; Gastrell v. Jones, 2 Roll. p. 448.

has power of visitation by way of simple inquiry, as the bishop's vicar; but in such inquiry he has no power to make corrections in his own name, except in smaller matters, unless custom give him that power. The like doctrine to that which had been delivered long before by John of Athon. Of common right, says he, the archdeacons have no power to usurp the greater matters to themselves, but only to report or intimate the same to the bishops. Beyond this, all the rights that any archdeacon enjoys, of what kind soever they be, subsist by grants from the bishops, either made voluntarily, to enable archdeacons to visit with greater authority and effect; or of necessity, as claimed and insisted on by archdeacons upon the foot of long usage and custom. But whatever might be the motive to these concessions on the part of the bishops, it seems that the powers enjoyed by archdeacons, beyond that which they claim of common right, accrued to them by express grant or composition (however the evidences may be lost); it being hard to imagine how deans and chapters, archdeacons, or any other persons, should be allowed to prescribe against a bishop for any branches of episcopal jurisdiction, and much more for an exemption from it ^(s).

But in virtue of such grants, and of institution to the office they are annexed to, not only the jurisdiction he enjoys is in the eye of the law ordinary jurisdiction, as being in reality a branch of episcopal power, but he himself is properly *ordinarius*, and is recognized as such by the books of common law, which adjudged an administration made by him to be good, though it was not expressed by what authority, because as done by the archdeacon it was presumed to be done *jure ordinario* ^(t).

Archidiaconal jurisdiction.

As to the divisions of dioceses into archdeaconries, and the assignment of particular divisions to particular archdeacons; this is supposed to have begun a little after the Norman conquest, when the bishops, as having baronies, and being tied by the constitutions of Clarendon to a strict attendance upon the kings in their great councils, were obliged to make larger delegations of power for the administration of their dioceses, than till that time had been accustomed ^(u). So Ayliffe says that "we meet with no archdeacons vested with any kind of jurisdiction in the Saxon times" ^(x).

For in the charter of William the Conqueror, for appointing the cognizance of ecclesiastical causes in a distinct place or court from the temporal, the archdeacon is mentioned in his ancient general state as the bishop's vicar; where it is said, that "no bishop or archdeacon shall any longer hold pleas in the hundred concerning episcopal matters." And as this charter did establish what we call the Consistory Court of the bishop in every diocese; so it did enable the bishop by degrees to assign to particular persons what share of episcopal jurisdiction he thought fit to be

^(s) Gibs. pp. 969, 970.

^(t) Gibs. p. 970.

^(u) Gibs. p. 970; 1 Warn. p. 275.

^(x) Ayl. Par. p. 97.

exercised archidiaconally within the districts by him appointed. And as this exercise by long usage grew into a claim, so those claims, stiffly maintained on the part of the archdeacons, ended in compositions (*y*). Which said assignment of particular powers to particular persons, within their proper districts, put an end to the general capacity of archdeacons, as vicars general throughout the whole diocese, and made way for those officers who are known in our provincial constitutions and the glosses upon them by the names of vicar general, official, and chancellor to the bishop, and who are vested with a delegated power to exercise, in the place of the bishop, all such jurisdiction as has not been granted away to others, or that he has not in the commission reserved to himself (*z*).

How
appointed.

Archdeaconries are commonly given by bishops, who do therefore prefer to the same by collation. But if an archdeaconry be in the gift of a layman, the patron does present to the bishop, who institutes in like manner as to another benefice; and then the dean and chapter do induct him; that is, after some ceremonies place him in a stall in the cathedral church to which he belongs, whereby he is said to have a place in the choir (*a*). And where there is this *locus in choro*, a *quare impedit* lies for an archdeaconry (*b*).

Subscription
required of.

Archdeacons by 14 Car. 2, c. 4, were to read the Common Prayer and declare their assent thereunto, as other persons admitted to ecclesiastical benefices, and to subscribe the same before the ordinary; but they were not obliged by 13 Eliz. c. 12, to subscribe and read the Thirty-nine Articles; for (says Dr. Watson) although an archdeaconry be a benefice with cure, yet it is not such a benefice with cure as seems to be intended by that statute, but only such benefices with cure as have particular churches belonging to them (*c*). It would seem that they are included under the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122) (*d*).

Archidiaconal
visitation.

In places where both the bishop and archdeacon do by prescription or composition visit at several times in one and the same year (*e*), the archdeacon, or his official, shall within one month next after the visitation ended that year, and the presentments received, certify under his hand and seal to the bishop or his chancellor, the names and crimes of all such as are presented in his said visitation, to the end the chancellor may not convent the same person for the same crime for which he is presented to

(*y*) An interesting example of this is contained in the award of the arbitrators, Dr. Bettesworth, official principal of the Arches Court; Dr. Audley, official principal and vicar general of the Archbishop of York; and Dr. Cottrell; made between the Chancellor of the Diocese of Oxford and the Archdeacon of Oxford, March 24, 1736.

(*z*) Gibs. p. 970.

(*a*) Wats. c. 15, p. 168.

(*b*) *Smalwood v. Bp. of Coventry*, Cro. Eliz. p. 141; 1 Leon. p. 284 n.; God. pp. 62, 66.

(*c*) Wats. c. 15, p. 169.

(*d*) Vide infra, Part II., Chap. XI., sect. 7.

(*e*) As in Oxford diocese in 1736, vide supra, note (*y*).

the archdeacon; which course the chancellor is in like manner to observe, in reference to the archdeacon, after the bishop's visitation ended. The which was ordained to prevent the prosecution of the same party for the same fault in divers ecclesiastical courts (*f*). And in cases of remitting causes from the inferior judge, the archdeacon cannot remit the cause to the archbishop, but he must remit it to his bishop, and he to the archbishop (*g*).

The archdeacon within the jurisdiction of his archdeaconry may, by virtue of his office, have his visitation, if he so please, or need shall require, once every year; but of necessity he is to have his triennial visitation (*h*). But whether of common right, and by the *jus commune*, the archdeacon may visit within the jurisdiction of his archdeaconry is some question, yet resolved by distinguishing whether the visitation be made *per modum scrutationis simplicis* by the archdeacon, as the bishop's vicar, and so he may visit of common right; but if in such enquiries he take upon him *nomine suo proprio* to correct faults, other than such small ones as wherein custom may warrant him; in such case it is held, that he has not power of visitation *de jure communi* (*i*). And in all such things as belong to his visitation he has jurisdiction, and by custom over lay-persons, as well as over the clergy. It seems therefore he may do all such things, as without the doing and despatch whereof his jurisdiction could not clearly appear (*k*); and therefore wherever he may take cognizance of a matter, there he may also give sentence and condemn (*l*), which is supposed to hold true by custom, and inasmuch as the cognizance and reformation of such matters do belong to the ecclesiastical court; whence it is that an archdeacon might, whilst church rates were compulsory, impose a penalty on laymen for the not repairing their parish church within his jurisdiction (*m*). For it is expressly enjoined and ordained, "That archdeacons and their officials shall, at their visitation of churches, take the condition of the fabrick thereof into special consideration, specially of the chancel; and in case there be need of reparations, shall set or fix a time within which such reparations shall be finished, which time is likewise to be set under a certain penalty" (*n*).

By the canon law a man cannot be an archdeacon under the age of twenty-five years (*o*). And by the council of Trent he ought to be a licentiate in law or divinity (*p*).

By the canon law, if one having a benefice with cure of souls accepts an archdeaconry, the archdeaconry is void, but it was

Qualifications.

Archdeaconry how far a benefice.

(*f*) Canons, 120, 121, of 1603.

(*g*) God. p. 63.

(*h*) Lind. p. 49, note (*z*).

(*i*) Ibid.

(*k*) God. p. 63, citing Dig. lib. ii. tit. 2, c. 1.

(*l*) God. p. 63, citing X. ii. 12,

4, and X. i. 29, 29.

(*m*) God. p. 63, citing X. i. 29, 43, and Lind. p. 50, note (*f*).

(*n*) Lind. p. 53; vide infra, Part IV., Chap. XI., sect. 3.

(*o*) Dist. lx. c. 2.

(*p*) Conc. Trid. 8, xxiv. c. 12.

expressly provided by 21 Hen. 8, c. 13, "that no deanery, archdeaconry, etc., shall be taken or comprehended under the name of a benefice having cure of souls in any article above specified." This was so declared in *Underhill's case* (q). Under 1 & 2 Vict. c. 106, s. 2, an archdeacon is permitted in certain circumstances to hold with his archdeaconry two benefices, or one benefice and one cathedral preferment (r).

Archdeacon's
jurisdiction.

In general, the archdeacon's jurisdiction is founded on immemorial custom, in subordination to the bishop's; and he is to be regulated as to his dignity, office and power according to the law, usage and custom of his own church and diocese.

For in some places the archdeacons had, before 6 & 7 Will. 4, c. 77, s. 14, much greater power than in others. As in the diocese of Carlisle, the archdeacon had no jurisdiction, but he retained still that more ancient right of examining and presenting persons to be ordained, and of inducting persons instituted.

Archdeacon's
official.

The judge of the archdeacon's court (where he does not preside himself) is called the official (s).

By the statute of the 24 Hen. 8, c. 12, an appeal lies from the archdeacon's to the bishop's court (t).

Ayliffe says (u), (citing Lindwood), that though an archdeacon's official cannot visit "*jure proprio*," he may in right of the archdeacon if the archdeacon himself is hindered.

Decisions of
official.

There are very few reported cases of decisions by the official of the archdeacon. The most celebrated is that of *The Churchwardens of St. John's, Margate v. The Parishioners, Vicar and Inhabitants of the same*, on an application for a faculty for accepting and erecting an organ, before Sir W. Scott, official to the archdeacon of Canterbury (v). At that time the archdeacon of Canterbury, by ancient composition with the archbishop, exercised episcopal jurisdiction in a great part of that diocese. And so Lindwood: "But besides these, archdeacons have likewise their officials to their exercise of ecclesiastical jurisdiction in certain parts of the diocese, having acquired jurisdiction from their bishops, either by an express composition or grant, or else by prescription and length of usage time out of mind" (x).

In 1808 the official of the archdeaconry of London decided, after hearing counsel on an act of petition and affidavits, that the secretary of the London Dock Company, occupying a furnished house belonging to the said company in the parish of St. Peter-le-Poor, was eligible to the office of churchwarden for the said parish. It should be remarked that the occupier paid taxes and rates in his own name, with the addition "for the Dock Company" for the house of which he was the sole inhabitant.

(q) Leon., pt. i. p. 316; see God.
p. 62.

(r) Vide infra, sect. 2.

(s) Wood., vide infra, Part V.,
Chap. IV., b. iv. c. 1.

(t) See *Parham v. Templar*, 3
Phillim. p. 243.

(u) Ayl. Par. p. 161.

(v) 1 Consist. p. 198.

(x) Ayl. Par. p. 161.

The following extract is taken from the registry of the official's court :—

"On Monday, the 14th day of March, in the year of our Lord 1808, before the worshipful Sir John Nicholl, Knight, Doctor of Laws, in and throughout the whole archdeaconry of London official lawfully constituted, in the Dining Room adjoining to the Common Hall of Doctors' Commons, situate in the parish of St. Benedict, near Paul's Wharf, London, and place of judicature there, in the presence of William Moore, *Dep. Reg.*

"Thornton against Robinson, }
Cobb. Bedford. } On petition of both proctors.

"Both proctors consented to time and place, and alleged and prayed as in acts of court. The judge having previously heard the act and affidavit read, and advocates and proctors on both sides, rejected Bedford's petition, and assigned George Robinson, Bedford's party, to take upon himself the office of churchwarden within a week from this time, but gave no costs.

"Cobb. Bedford."

Another case of more recent date, and yet one *primæ impressionis*, was tried before the official of the same archdeacon (*y*), in which the court refused to compel a Quaker to take upon him the office of churchwarden, which he was cited to do by a churchwarden of the parish of Allhallows, having been duly elected to it by the parishioners (*z*).

In *Robinson v. Godsalve*, upon motion for a prohibition to stay a suit in the bishop's court, upon suggestion that the party lived within a peculiar archdeaconry, it was resolved by the court, that where the archdeacon has a peculiar jurisdiction, he is totally exempt from the power of the bishop, and the bishop cannot enter there, and hold court; and in such case, if the party who lives within the peculiar be sued in the bishop's court, a prohibition shall be granted; for the statute intends that no suit shall be *per saltum*: but if the archdeacon has not a peculiar, then the bishop and he have concurrent jurisdiction, and the party may commence his suit, either in the archdeacon's court or the bishop's, and he has election to choose which he pleases: and if he commence in the bishop's court, no prohibition shall be granted; for if it should, it would confine the bishop's court to determine nothing but appeals, and render it incapable of having any causes originally commenced there (*a*).

There are two other reported cases tried in the court of the archdeacon, both relating to the election of churchwardens. *Story v. Colk* (*b*) and *Westerton v. Davidson* (*c*).

The case of a clergyman proceeded against for refusing to open his church to the archdeacon on his visitation occurred in 1821 (*d*).

(*y*) *Adey v. Theobald*, 1 Curt. p. 447.

(*z*) But see *Rex v. Archdeacon of Middlesex*, 3 A. & E. p. 615.

(*a*) 1 Ld. Raym. p. 123.

(*b*) 6 N. C. p. xxxiii.

(*c*) 1 Spinks, p. 385.

(*d*) Not reported. *Wollaston v.*

Course of
appeal from
archidiaconal
court.

The question of appeals from inferior to superior ecclesiastical courts underwent an elaborate discussion in the case of *Parham v. Templar*, in the course of which Sir John Nicholl said, "The statute regulating appeals from archdeacons does not appear to me to regulate any appeals from deans and chapters; for a dean and chapter are of higher rank than an archdeacon." "The dean and chapter has in some instances a control over the bishop; while the archdeacon is only an officer of the bishop, and is sometimes called *oculus episcopi*, subordinate to him, and supervising for him" (e). But he admits, "even archdeacons themselves may have their peculiars; and in that case they would not be bound by the statute of Hen. 8." The same learned judge, in *Prankard v. Deacle* (f), says, "The general jurisdiction of the diocese is in the bishop, and archdeacons only have that which the bishop chooses to grant out to them;" and seemed to be of opinion that where the archidiaconal and episcopal courts were concurrent in jurisdiction, there was no irregularity, even in form, in invoking, on the death of the archdeacon, the causes in his court into the episcopal court. Generally speaking, then, the appeal from the archdeacon's court is to that of the bishop of the diocese; but when the former had a peculiar, it lay, as it did in the case of a dean and chapter, to the court of the archbishop. Sir John Nicholl's opinion, that the jurisdiction of a dean and chapter is superior to that of the archdeacon, appears to be at variance with the declaration of Ayliffe. "An archdeacon," he says, "is by custom a greater person in his district than the dean of a cathedral church, and particularly in those things which do of common right or by custom belong to his office: for an archdeacon is greater than a dean in a point of jurisdiction out of the cathedral church; because in all such matters a dean ought to be subject to him. But in the cathedral church, and in the celebration of divine service, an archdeacon ought to be subject to the dean; but in all these things the custom of churches ought to be regarded; according to which a dean, simply speaking, is inferior to an archdeacon."

Annexation
of prebend.

It was said under the old law (g), that a prebend being an ecclesiastical benefice and not a mere office, the crown may alienate it or annex to it an archdeaconry, the archdeacon being a corporation sole, and also a spiritual person capable of discharging all the duties and exercising all the functions belonging to a prebend; but an annexation once made cannot be severed.

Clarke, Consist. of London, 20th July, 1821, Trinity Term. Vide infra, Part IV., Chap. XI., sect. 3.

(e) 3 Phillim. p. 243.

(f) 1 Hagg. Eccl. p. 189.

(g) *King v. Bayley*, 1 B. & Ad. p. 761. See 2 & 3 Will. 4, c. 10, annexing a canonry or prebend at Durham to the archdeaconry of Durham.



SECT. 2.—*Under Modern Statutes.*

Secondly, we have to consider the effect of recent statutes upon the office and benefice of the archdeacon.

By 6 & 7 Will. 4, c. 77, s. 19, it is enacted "that all archdeacons throughout England and Wales shall have and exercise full and equal jurisdiction within their respective archdeaconries, any usage to the contrary notwithstanding." Jurisdiction.

By 1 & 2 Vict. c. 106, s. 2, an archdeacon may, under certain limitations, hold together with his archdeaconry two benefices, one of which is situated within the diocese of which his archdeaconry forms a part, or one cathedral preferment in any collegiate or cathedral church of the diocese of which his archdeaconry forms a part, and one benefice situate within such diocese (*h*). Pluralities.

The 3 & 4 Vict. c. 113, s. 27, enacts, that hereafter no person shall be appointed archdeacon who has not been six years complete in priest's orders. Qualification.

"The dioceses within this realm of England" (says Godolphin), "are divided into several archdeaconries, they being more or less in a diocese according to the extent thereof respectively, and in all amounting to the number of three-score: and they divided again into deaneries, which also are subdivided into parishes, towns and hamlets" (*i*). Number of archdeaconries.

By 6 & 7 Will. 4, c. 79, seven new archdeaconries were recommended to be created and districts assigned to them: Bristol, Maidstone, Monmouth, Westmoreland, Manchester, Lancaster and Craven. Archidiaconal power also was to be given to the dean of Rochester within that part of Kent which would remain within the diocese of Rochester (*h*), and the limits of other existing deaneries and archdeaconries were to be so newly arranged that every parish and extra-parochial place be within a rural deanery, and every deanery within an archdeaconry, and that no archdeaconry extend beyond the limits of one diocese; and all the archdeaconries of England and Wales were to be in the gift of the bishop of the diocese in which they are situated.

These arrangements were carried into effect by Orders in Council.

And by 3 & 4 Vict. c. 113 it is also enacted as follows: Sect. 16. "That in any cathedral church in which by the suspension of canonries the number of canons shall be reduced to four, one of such suspended canonries may by the authority One suspended canonry may be filled up to endow archdeaconries.

(*h*) Though sect. 124 seems to comprehend an archdeaconry under the title cathedral preferment. Vide *infra*, Part IV., Chap. III., sect. 6.

(*k*) Repealed by 26 & 27 Vict. c. 37, s. 3; by which act the jurisdiction was given to the Archdeacon of St. Albans.

(*i*) God. p. 61.

hereinafter provided, if it be deemed necessary for the purpose of endowing any archdeaconry or archdeacons, be filled up, subject to the provisions hereinafter contained respecting the endowment of archdeacons by the annexation of canonries thereto."

Power to divide existing archdeacons and rural deaneries.

Sect. 32. "And whereas, under the first-recited act (*l*), certain new archdeacons therein named may, by the authority thereby provided, be created, and districts may be assigned thereto, and the limits of the existing archdeacons and rural deaneries may be newly arranged; and whereas it is expedient to extend the power of creating new archdeacons and rural deaneries: be it enacted, in any case in which it shall appear, upon the representation of the bishop, to be proper to divide any archdeaconry or rural deanery on account of the magnitude thereof, or any other peculiar circumstance connected therewith, such archdeaconry or rural deanery may, by the authority hereinafter provided, be divided into two or more portions, and each of such portions may be constituted a separate archdeaconry or rural deanery, as the case may be, and a district may be assigned thereto; provided always, that no such division shall be made without the consent of the bishop under his hand and seal."

To create new archdeacons and rural deaneries, &c.

Sect. 32 of 3 & 4 Vict. c. 113, is extended by 37 & 38 Vict. c. 63, s. 1, which declares that the ecclesiastical commissioners shall have and shall be deemed to have always had power by scheme, with the consent of the bishop as to all new schemes, to alter the area of any archdeaconry or rural deanery, to diminish the number of archdeacons or rural deaneries, to make new rural deaneries, to alter the names of any archdeaconry or rural deanery, and to give names to newly constituted ones.

But by the same section it is provided that every parish must be in its entirety within a rural deanery, every rural deanery in its entirety within an archdeaconry, and that an archdeaconry must not extend beyond a diocese.

By sect. 2 of the same act, bishops are to deposit in their diocesan registries a schedule of all rural deaneries so accounted at the passing of this act, and they are to be deemed legal rural deaneries.

Bishops of London and Lincoln may appoint an archdeacon to the new canonries of St. Paul's and Lincoln.

Sect. 33 of 3 & 4 Vict. c. 113, enables the Bishops of London and Lincoln respectively to "appoint one of the archdeacons of their respective dioceses to the new canonries hereby added to the respective chapters of their cathedral churches": and provides that "every archdeacon so appointed to a canonry shall thereupon become and be a canon of the cathedral church of Saint Paul or Lincoln, and a member of the chapter of such church, to all intents and purposes, and possessed of and entitled to the like rights, privileges, dignities and emoluments as are possessed by other canons in the same church, subject nevertheless to the provisions herein contained." This has been done.

By sect. 34. "So soon as conveniently may be, and by the authority hereinafter provided, subject to the consent of the bishop, any archdeaconry may be endowed by the annexation either of an entire canonry, or of a canonry charged with the payment of such portion of its income as shall be determined on towards providing for another archdeacon in the same diocese, or with such last-mentioned portion of the income of a canonry, or by augmentation out of the common fund hereinafter mentioned, provided that the said augmentation shall not be such as to raise the average annual income of any archdeaconry to any amount exceeding two hundred pounds; and that no canonry shall be so charged with the payment of a portion of the income thereof to any archdeacon, unless the average annual income of such canonry, after the payment of such portion as aforesaid, shall amount to or exceed five hundred pounds; provided always, that no archdeacon shall be entitled to hold any endowment or augmentation, or other emolument as such archdeacon under the provisions of this act, unless he shall be resident for the space of eight months in every year within the diocese in which his archdeaconry is situate, or as to any present archdeacon, within the diocese in which his archdeaconry was situate before the passing of the first-recited act, subject to the same provisions as to licences for non-residence which are enacted with respect to incumbents of benefices by 1 & 2 Vict. c. 106."

Provision for archdeaconries.

By sect. 35. "Instead of appointing one archdeacon to either of the new canonries respectively founded in the cathedral churches of Saint Paul, in London, and of Lincoln, or of annexing a canonry in any cathedral or collegiate church to an archdeaconry as aforesaid charged with any payment to another archdeacon in the same diocese, the rights, duties and emoluments of any canonry, the average annual income of which may exceed eight hundred pounds, may, by the authority hereinafter provided, be annexed to two archdeaconries jointly within the same diocese, not otherwise competently endowed, each archdeacon taking his turn of residence for such time, and taking such share of the emoluments, as shall be directed by the scheme and order authorizing such annexation; and each archdeacon shall during his turn of residence have all the rights and privileges of a canon (except as to the division of the emoluments); and every future archdeacon whose archdeaconry shall be endowed as last aforesaid shall be deemed the holder of cathedral preferment within the meaning of the last-recited act."

Further provision for archdeaconries.

By sect. 36, provision was made for the archdeaconry of Nottingham and the parish of Southwell; but this is repealed by 4 & 5 Vict. c. 39, s. 12.

By sect. 39 of 3 & 4 Vict. c. 113, provision is made for archdeaconries of Brecon and Carmarthen.

By sect. 56. "Upon the endowment of any archdeaconry by either of the modes of endowment herein provided, and with the consent of the bishop of the diocese and of any archdeacon in

Estates of newly-endowed archdeaconries

vested in
ecclesiastical
commis-
sioners.

possession at the time of the passing of this act, all lands, tithes, and other hereditaments (except any right of patronage) belonging to such archdeaconry at the time of such endowment may, by the authority hereinafter provided, be vested in the ecclesiastical commissioners for England, and their successors, for the purposes of this act; and any benefice annexed to such archdeaconry may be, by the like authority, disannexed therefrom, and the patronage of such benefice shall thenceforth revert to the patron to whom it belonged before such annexation, subject to any transfer of patronage provided by this act."

4 & 5 Vict.
c. 39.

Archdeacons
may be
endowed with
benefices.

And it is further enacted by 4 & 5 Vict. c. 39—

Sect. 9. "That, notwithstanding anything in the said secondly-recited act contained, it shall be lawful by the authority in the same act provided, with the consent of the bishop of any diocese, and of the patron of any benefice within the limits of any archdeaconry in such diocese, to endow such archdeaconry, by the annexation thereto of such benefice, such annexation to take effect immediately if the benefice be vacant at the time of such endowment or otherwise upon the then next vacancy thereof; and every benefice so annexed, and every future holder thereof, shall be subject to all the provisions of 1 & 2 Vict. c. 106."

By sect. 10, the provision in 1 & 2 Vict. c. 106, as to archdeacons holding two benefices, "one of which benefices shall be situate within the diocese of which his archdeaconry forms a part, or one cathedral preferment in any cathedral or collegiate church of the diocese of which his archdeaconry forms a part, and one benefice situate within such diocese": "shall extend and apply to benefices locally situate within the diocese of which any such archdeaconry shall form a part, although the same may not be subject to the jurisdiction of the bishop of such diocese."

Power to raise
the income of
any arch-
deaconry to
£200 per
annum.

It is provided by the Ecclesiastical Commissioners Act, 1840, Amendment Act, 1885 (48 & 49 Vict. c. 55), s. 2, that "it shall be lawful for the ecclesiastical commissioners for England, at any time after ascertaining the sum required to raise the income of any archdeaconry to the sum of two hundred pounds per annum, to submit to her Majesty in council for ratification under the powers of the said Ecclesiastical Commissioners Act, 1840, that is to say, the act 3 & 4 Vict. c. 113, s. 34, a scheme or schemes for authorizing the payment out of their common fund to the holder of the same archdeaconry for the time being of the sum so required, and this notwithstanding that the powers contained in the same section or in this act may have been previously exercised in favour of the same archdeaconry; provided always, that no augmentation to be granted under this act shall be such as to raise the average annual income of any archdeaconry to an amount exceeding two hundred pounds."

New dioceses.

Under the various acts for creating new bishoprics, special provisions have been made for altering the boundaries of arch-

deaconries and as to the status of archdeacons. See for St. Albans, 38 & 39 Vict. c. 34, ss. 5, 9; for the archdeaconry of Northumberland, 47 & 48 Vict. c. 33, s. 13; for the archdeacon of Rochester, 41 & 42 Vict. c. 68, s. 10.

Under 41 & 42 Vict. c. 68, s. 7, schemes may be made, *inter alia*, "For enabling any archdeacon whose archdeaconry is affected by the foundation of the new bishopric to reside in any place in which he is residing at the date of the scheme, and for making such arrangements as may seem to the ecclesiastical commissioners requisite to preclude any officer holding office at the date of the passing of this act from being prejudiced by this act or any Order in Council or scheme made thereunder."

The provisions as to the Welsh archdeaconries contained in 6 & 7 Vict. c. 77 have already been mentioned (*m*). Welsh archdeaconries.

By sect. 3 of 3 & 4 Vict. c. 86, the archdeacon is enumerated among those who may be the assessors of the bishop in hearing proceedings against a clergyman; but it is not imperative on the bishop to appoint him. Church Discipline Act, 1840.

By 7 & 8 Vict. c. 58, the Archdeacon's Court is empowered to try questions relating to the discipline of parish clerks (*n*). Parish clerks.

Further provisions as to vesting the estates of archdeacons in the ecclesiastical commissioners are contained in the later acts relating to this body, and will be found treated of in the chapter on the Ecclesiastical Commissioners (*o*). Estates.

Under the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), the surveyors of dilapidations are to be elected by the archdeacons and rural deans of the diocese (s. 8); and an archdeacon or rural dean may complain to the bishop of the state of the buildings on any benefice (s. 12). Dilapidations.

Under the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), any archdeacon in the diocese may be one of the commissioners (s. 5). Incumbents' resignation.

By the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8, power is given to the archdeacon to make representations under that act as to any church or burial ground within his archdeaconry. Public Worship Regulation Act.

By 48 & 49 Vict. c. 54, s. 3, the archdeacon or rural dean of the archdeaconry or rural deanery in which a benefice is locally situate shall be one of the commissioners on inquiries under that act as to the inadequate performance of ecclesiastical duties by the incumbent of that benefice. And by sect. 5, the archdeacon of every archdeaconry must forthwith after the passing of the act, and afterwards at the expiration of every three years, convene a meeting of the beneficed clergy of his archdeaconry for the purpose of electing a commissioner. Commissions.

(*m*) Vide supra, p. 185.

(*n*) Vide infra, Part VI., Chap. VII., sect. 1.

(*o*) Vide infra, Part IX., Chap. III. See in particular 24 & 25 Vict. c. 131; 29 & 30 Vict. c. 111, ss. 15, 16.

CHAPTER VI.

RURAL DEANS.



WE have next to consider the institution of rural deans.

Antiquity of
the office of
rural dean.

The office of rural deans was not unknown to our Saxon ancestors (*a*). For in one of the laws ascribed to Edward the Confessor, it is provided, that of eight pounds penalty for breach of the king's peace, the king shall have an hundred shillings; the earl of the county fifty shillings; and the dean of the bishop in whose deanery the peace was broken, the other ten: "which words can be applied only to the office of rural deans, according to the respective districts which they had in the parts of every diocese" (*b*).

Appointment
of rural deans.

And as in the aforesaid law of King Edward the Confessor the rural dean is there called the dean of the bishop, so without doubt he was appointed by the bishop to have the inspection of clergy and people within the district in which he was incumbent, under him, and him alone; in like manner as the archipresbyter at the episcopal see was one of the college of presbyters, appointed at the pleasure of the bishop, who in his absence might preside over them, and under him have the chief care of all matters relating to the church. But as in process of time, by the concession of the bishops, the cathedral archipresbyter or dean became elective, and being chosen by the college of presbyters, or the chapter, was only confirmed by the bishop; so after that the archdeacon, by the like concessions, became a sharer in the administration of episcopal jurisdiction, he became of course a sharer in the appointment of rural deans (*c*).

The archdeacon likewise, at the end of his visitation, ought to present to the bishop all such persons as he shall find in every deanery, qualified in point of doctrine and judgment for preaching and instructing the people. And out of these the bishop may choose whom he pleases for his rural deans (*d*).

(*a*) This introductory sketch is taken in substance from Kennett. But his speculations as to the boundaries of deaneries being continuous with hundreds, or as to each deanery being a collection of

ten churches, have been shown by modern research to be erroneous, and have therefore been omitted.

(*b*) Ken. Paroch. Ant. p. 633.

(*c*) Gibs. p. 971.

(*d*) Ayl. Par. p. 99.

The oath of office which in some dioceses was anciently administered to them, was this:—"I, A. B., do swear diligently and faithfully to execute the office of dean rural within the deanery of D. First, I will diligently and faithfully execute, or cause to be executed, all such processes as shall be directed unto me from my Lord Bishop of B. or his officers or ministers by his authority. Item, I will give diligent attendance, by myself or my deputy, at every consistory court, to be holden by the said reverend father in God, or his chancellor, as well to return such processes as shall be by me or my deputy executed, as also to receive others, then unto me to be directed. Item, I will from time to time, during my said office, diligently inquire, and true information give unto the said reverend father in God, or his chancellor, of all the names of all such persons within the said deanery of D. as shall be openly and publicly noted and defamed, or vehemently suspected of any such crime or offence as is to be punished or reformed by the authority of the said court. Item, I will diligently inquire, and true information give, of all such persons and their names, as do administer any dead men's goods, before they have proved the will of the testator, or taken letters of administration of the deceased intestates. Item, I will be obedient to the right reverend father in God, J., Bishop of B., and his chancellor, in all honest and lawful commands; neither will I attempt, do, or procure to be done or attempted, any thing that shall be prejudicial to his jurisdiction, but will preserve and maintain the same to the uttermost of my power" (e).

Their ancient
oath of office.

From whence it appears, that besides their duty concerning the execution of the bishop's processes, their office was to inspect the lives and manners of the clergy and people within their district, and to report the same to the bishop; to which end, that they might have knowledge of the state and condition of their respective deaneries, they had a power to convene rural chapters (f).

Their holding
rural
chapters.

Which chapters were made up of all the instituted clergy, or their curates as proxies of them, and the dean as president or prolocutor. These were convened either upon more frequent and ordinary occasions, or at more solemn seasons for the greater and more weighty affairs. Those of the former sort were held at first every three weeks, in imitation of the courts baron, which run generally in this form: *de tribus septimanis in tres septimanas*; but afterwards they were most commonly held once a month, at the beginning of the month, and were for this reason called *kalendæ* or monthly meetings. But their most solemn and principal chapters were assembled once a quarter, in which there was to be a more full house, and matters of great import were to be here alone transacted. All rectors and vicars, or their capellanes, were bound to attend these chapters, and to bring information of all irregularities committed in their respec-

(e) God. App. pp. 6, 7.

(f) Gibs. p. 973.

tive parishes. If the deans were, by sickness or urgent business, detained from their appearing and presiding in such conventions, they had power to constitute their sub-deans or vicegerents. The place of holding these chapters was at first in any one church within the district, where the minister of the place was to procure for, that is, to entertain the dean and his immediate officers. But because in parishes that were small and unfrequented, there was no fit accommodation to be had for so great a concourse of people; therefore in a council at London, under Archbishop Stratford, in the year 1342, it was ordained that such chapters should not be held in any obscure village, but in the larger or more eminent parishes (g).

In pursuance of which institution of holding rural chapters and of the office of rural deans in inspecting the manners of clergy and people, and executing the bishop's processes for the reformation thereof, we find a constitution of Archbishop Peccham, by which it is required, that the priests, on every Sunday immediately following the holding of the rural chapter, shall expound to the people the sentence of excommunication (h).

And in these chapters continually presided the rural deans, until that Otho, the pope's legate, required the archdeacons to be frequently present at them, who being superior to the rural deans did in effect take the presidency out of their hands; inso-much that in Edward the First's reign, John of Athon gives this account of it: "Rural chapters," says he, "at this day are holden by the archdeacon's officials, and sometimes by the rural deans." From which constitution of Otho we may date the decay of rural chapters; not only as it was a discouragement to

(g) Ken. Paroch. Ant. pp. 639, 640. See also Gibs. p. 973.

(h) Lind. p. 353. See also the following passage: Quia incontinentiæ vitium *et infra*. Constitutionem Domini Othoboni, contra Concubinos editam Præcipimus inviolabiliter observari. Omnibusque et singulis coepiscopis suffraganeis nostris in virtute obedientiæ, et sub pœna suspen-

sionis ab officio et beneficio quam in ipsos ferimus, si sponte circa hoc fuerint negligentes, firmiter injungendo mandamus, quatenus constitutionem prædictam faciant in quatuor anni principalibus capitulis ruralibus, per se vel eorum officiales, vel saltem per decanos rurales,* vel gerentes eorum vices distinctè et apertè coram toto capitulo exclusis laicis recitari. . . .

* *Decanos rurales*. On these words Lyndwood glosses as follows: De quibus loquitur decretalis ad hæc *extra. de offi. Archi.* Et sunt hi decani temporales ad aliquod ministerium sub episcopo vel archiepiscopo exercendum constituti, *ut no. in eod. c. super ver., ab omnibus. per Immo. & Hostien. concor. in eod. c. & hos vocat Jo. An. in addi. testes synodales, de quibus sit mentio extra de testi. cogen. c. præterea.* nec habent institutionem canonicam

tanquam in beneficio, secundum doctores prædictos: et de hujusmodi decanis etiam habetur de *cens. c. cum Apostolis. in constitutione Othonis, Quod in quodam, et in constitutione, Quoniam tabellionum.* Et dicuntur decani, eo quod decem clericis sive parochiis præsent, secundum *Papiam et no. l. di. in capite post principium. per Arch. in Rosario, et facit ad item C. de Deca. lib. 12, ubi de hoc super rubr.* Lind. pp. 10, 14, note (c).

the rural dean, whose peculiar care the holding of them had been, but also, as it was natural for the archdeacon and his official to draw the business that had been usually transacted there, to their own visitation, or, as it is styled in a constitution of Archbishop Langton, to their own chapter (*i*).

And this office of inspecting and reporting the manners of the clergy and people rendered the rural deans necessary attendants on the episcopal synod or general visitation, which was held for the same end of inspecting, in order to reformation. In which synods (or general visitation of the whole diocese by the bishop) the rural deans were the standing representatives of the rest of the clergy, and were there to deliver information of abuses committed within their knowledge, and to propose and consult the best methods of reformation. For the ancient episcopal synods (which were commonly held once a year) were composed of the bishop as president, and the deans cathedral or archipresbyters in the name of their collegiate body of presbyters or priests, and the archdeacons or deputies of the inferior order of deacons, and the urban and rural deans in the name of the parish ministers within their division, who were to have their expenses allowed to them according to the time of their attendance, by those whom they represented, as the practice obtained for the representatives of the people in the civil synods or parliament. But this part of their duty which related to the information of scandals and offences, in progress of time devolved upon the churchwardens, and their other office of being convened to sit members of provincial and episcopal synods, was transferred to two proctors or representatives of the parochial clergy in every diocese to assemble in convocation, where the cathedral deans and archdeacons still kept their ancient right, whilst the rural deans have given place to an election of two only for every diocese, instead of one by standing place for every deanery (*k*).

Their attendance at the bishop's visitation.

And albeit their office at first might be merely inspection, yet by degrees they became possessed of a power to judge and determine in smaller matters; and the rest they were to report to their ecclesiastical superiors (*l*).

Their judicial and other authority, ordinary and extraordinary.

And by special delegation they had occasionally committed to them the probate of wills, and granting administration of the goods of persons intestate; the custody of vacant benefices, and granting institutions and inductions; and sometimes the decisions of testamentary causes, and of matrimonial causes, and matters of divorce. Of which there appear some footsteps in one of the legatine constitutions of Otho: by which it is enjoined, that the dean rural shall not thereafter intermeddle with the cognizance of matrimonial causes: and by another constitution of the same legate, he is commanded to have an

(*i*) Gibs. p. 973.

649.

(*k*) Ken. Paroch. Ant. pp. 648, (*l*) Gibs. p. 972.

authentic seal: all which shows, that anciently there was somewhat of jurisdiction intrusted with them (*m*). It is said that, before their declining state, they were sometimes made a sort of *chorepiscopi*, or rural bishops: being commissioned by the diocesan to exercise episcopal jurisdiction, for the profits whereof they paid an annual rent: but as the primitive *chorepiscopi* had their authority restrained by some councils, and their very office by degrees abolished; so this delegation of the like privileges to rural deans, as a burden and scandal to the church, was inhibited by Pope Alexander III. and the Council of Tours (*n*).

Their continuance in their office.

This office has been always of a temporary nature; and is expressly declared so to be both by Lindwood and John de Athon. And this was the reason why the seals which they had for the due return of citations, and for the dispatch of such business as they should be employed about, had only the name of the office (and not, as other seals of jurisdiction, the name of the person also) engraven in it (*o*).

But in the diocese of Norwich, the admission of rural deans seems to have been more solemn than elsewhere, and their continuance perpetual: for whilst that see was vacant, in the time of Archbishop Whitlesey, several rural deans there were collated, whereas in other places they are only said to be admitted; and in an ancient metropolitical visitation of the same diocese, the first in every deanery is such a one perpetual dean (*p*).

And perhaps several of the deans of peculiars may have sprung originally from rural deans.

Their disuse.

Finally, By the prescription and power of the archdeacons and their officials, it happened, that in the next age before the reformation of our church, the jurisdiction of rural dean in this island declined almost to nothing. And at the Reformation, in the public acts of our reformers, no order was taken for the restoration of this part of the government of the church. In the *Reformatio Legum* this was provided for, but fell to the ground for want of confirmation by the legislative power. So that these rural officers in some deaneries had at one time become extinct, in others had only a name and shadow left. Nor do we find any express care further taken for the support of this office, but only in the provincial synod of convocation held at London, April 3, 1571, by which it was ordained, that "the archdeacon, when he hath finished his visitation, shall signify to the bishop what clergymen he hath found in every deanery so well endowed with learning and judgment, as to be worthy to instruct the people in sermons, and to rule and preside over others: out of these the bishop may chuse such as he will have to be rural deans" (*q*).

(*m*) Ken. Paroch. Ant. pp. 641—644, 647; Gibs. p. 972; God. App. p. 7.

(*n*) Ken. Paroch. Ant. p. 639.

(*o*) Gibs. p. 972; Otho. Athon, p. 69. And see *Braithwaite v. Hook*,

Special Report, and 8 Jur. N. S. p. 1186.

(*p*) Ibid.

(*q*) Ken. Paroch. Ant. pp. 652, 653; God. App. p. 7.

This office—pronounced by the high authority of Sir L. Jenkins (*r*) to be of great usefulness to the church—has lately been resuscitated. As the duties of the rural dean are now clearly those of inspection and report only, they are ancillary to and not conflicting with those of the archdeacon.

It was recommended by 6 & 7 Will. 4, c. 77 (*s*), that every parish be within a rural deanery, and every deanery within an archdeaconry.

And by 3 & 4 Vict. c. 113, s. 32, it is provided that, on the representation of the bishop, any rural deanery may be divided, and each portion constituted a separate rural deanery.

By 37 & 38 Vict. c. 63, power is given to alter the area of rural deaneries, to increase or diminish their number, and to name the new ones. Every parish is in its entirety to be within one rural deanery. Every rural deanery similarly in one archdeaconry (*t*).

By 3 & 4 Vict. c. 86, s. 3, it is provided that a rural dean within the diocese may be one of the five commissioners appointed by the bishop to institute a preliminary inquiry into charges against a clerk in holy orders.

For the powers of rural deans under the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), ss. 8, 12, see above (*u*). Under the Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), any rural dean in the diocese may be one of the commissioners (s. 5). Under the act 48 & 49 Vict. c. 54, s. 3, the rural dean or the archdeacon is to be one of the commissioners (*x*).

Modern position of rural deans.

Areas of rural deaneries.

Commissioners under Church Discipline Act.

Modern statutory powers.

(*r*) Life of Sir Leoline Jenkins, vol. i. Preface, p. lii.

(*s*) Sect. 1, and Recomm. 53.

(*t*) Vide supra, p. 204.

(*u*) Page 207.

(*x*) Vide supra, p. 207.

CHAPTER VII.

DEANS OF PECULIARS.



Deans without
jurisdiction.

THE word dean is also applied to divers that are the chief of certain peculiar churches or chapels: as the dean of her majesty's chapel royal, and the dean of the chapel of St. George at Windsor; not necessarily being the heads of any collegiate body, nor endowed with any jurisdiction, but only dignified and honoured with the name and title (*a*).

Without a
chapter,

And as there are some deans without jurisdiction, so there were also some deans with jurisdiction, but without any chapter: as the dean of Croydon in Surrey, the dean of Battle in Sussex, the dean of Bocking in Essex, the dean of Stamford, and many others (*b*).

Dean of the
Arches.

The dean of the Arches was the judge of the Court of Arches, so called of Bow Church in London, by reason of the steeple thereof raised at the top with stone pillars in fashion like a bow bent archwise; in which church this court was ever wont to be held, being the chief and most ancient court and consistory of the jurisdiction of the Archbishop of Canterbury (*c*), which parish of Bow, together with twelve others in London, whereof Bow is the chief, were within the peculiar jurisdiction of the said archbishop in spiritual causes, and exempted out of the Bishop of London's jurisdiction (*d*).

And it is supposed that he was originally styled dean of this court by reason of his substitution to the archbishop's official, when he was employed abroad in foreign embassies; whereby both these names or styles became at last in common understanding, as it were, but not in reality, synonymous (*e*); the official principal of the Arches Court of Canterbury being the judge throughout the province, and having by his patent the right of hearing appeals from the dean (*f*). In fact no dean is now appointed.

(*a*) God. pp. 52, 54.

(*b*) God. p. 52. See specially as to the Dean of Battle, Wats. c. 15, p. 110.

(*c*) But see 10 Geo. 4, c. 53, s. 11.

(*d*) God. p. 96. These parishes

were in 1845 made part of the diocese of London. See Orders in Council (referred to on p. 27), vol. iii. p. 269.

(*e*) God. p. 102.

(*f*) Vide infra, Part IV., Chap. IV.

The Court of Peculiars of the Archbishop of Canterbury had special provisions made as to its practice by 10 Geo. 4, c. 53.

There is or was also a deanery of St. Martin le Grand in London, concerning which Lindwood puts the question, whether it be such an ecclesiastical benefice as that the incumbent thereof may incur such penalties as other persons beneficed may incur. And after deep inquiries into the laws, precedents and antiquities, foreign and domestic, with delectable variety of great learning on both sides argumentatively and impartially, at last concludes it in the affirmative (*g*).

Dean of
St. Martin's.

It is said, that after the death of the dean of a free chapel belonging to the king, the king shall have the profits of the deanery; for it is at his pleasure whether he will collate a new dean to it (*h*).

Profits during
vacation.

Now, however, by various acts, deans of peculiars have been deprived of almost all their jurisdiction. By 1 & 2 Vict. c. 106, s. 108, archbishops and bishops have jurisdiction for the purposes of that act over all peculiars within their province or diocese. By 3 & 4 Vict. c. 86, all proceedings under that act against clerks in holy orders take place before the bishop of the diocese. By 10 & 11 Vict. c. 98, an annual act, but continued yearly, the bishop of every diocese shall by himself or his officers exercise jurisdiction throughout his diocese. Sect. 5, however, continues to the authority of a peculiar the power to grant marriage licences concurrently with the bishop of the diocese (*i*).

Peculiars,
how far
abolished.

By 3 & 4 Vict. c. 113, s. 29, the peculiar parishes of St. Margaret and St. John, Westminster, are made part of the diocese of London (*k*).

13 & 14 Vict. c. 76, makes special provision for abolishing the royal peculiar of St. Burian's in Cornwall.

And the ecclesiastical commissioners are empowered by various statutes to frame schemes for the abolition of other peculiars (*l*).

(*g*) God. p. 53; Lind. p. 125.

(*h*) God. p. 52.

(*i*) Vide *infra*, Part III., Chap. VII., sect. 7.

(*k*) See *Combe v. Dela Bere*, 22 Ch. D. p. 316, where the subject of the

exemption of royal palaces is also discussed.

(*l*) See 6 & 7 Will. 4, c. 77, s. 10; 13 & 14 Vict. c. 94, s. 24. Vide *infra*, Part IV., Chap. IV.

CHAPTER VIII.

TITLES OF OFFICIATING CLERKS.



Titles. CLERKS in holy orders who are employed in discharging offices, other than those already mentioned, in the church, have various designations in various states.

In England these officers are known to the law by the following designations:—

1. Parson or Rector.
2. Vicar.
3. Curate, Stipendiary.
4. Curate, Perpetual.
5. Minister of Chapel of Ease.
6. Donee.
7. Chaplain.
8. Lecturer.
9. "Reader," though the office may in our Church be discharged by a Layman.

Who have cure. Of these clerks in holy orders the rector, vicar, perpetual curate and donee have benefices with cure of souls. It is proposed to give some account of these officers and of the ministers of chapels of ease before the general subject of benefice and advowson be examined.

Who not. In a subsequent chapter the stipendiary curate, the chaplain, the lecturer, the reader, who have not, strictly speaking, benefices, will be treated of.

Ministers under Church Building Acts. For the various classes of officiating ministers created by the Church Building Acts, the later part of this work which deals with this subject may be consulted (*a*).

(*a*) Part IX., Chaps. V., VI.

CHAPTER IX.

PARSONS OR RECTORS AND VICARS.

- SECT. 1.—*Preliminary.*
 2.—*Origin of the Appropriation of Churches.*
 3.—*Endowment of Vicarages upon Appropriation.*
 4.—*Augmentation of Vicarages.*
 5.—*Dissolution of Vicarages.*
 6.—*Conversion into Rectories.*
 7.—*Some Miscellaneous Points.*

SECT. 1.—*Preliminary.*

PARSON, *persona*, properly signifies the rector of a parish church; because during the time of his incumbency he represents the church, and in the eye of the law sustains the person thereof, as well in suing as in being sued, in any action touching the same (*a*). Parson or rector.

Parson imparsonnee (*persona impersonata*) is he that as lawful incumbent is in actual possession of a parish church, and with whom the church is full, whether it be presentative or impropriate (*b*).

Vicars are next to be considered. It is necessary to explain the account of the *status* of vicars by a sketch of what is known to our law by the title of "Appropriation." Vicars.

The subject may be discussed under these four heads:—

- Origin of the Appropriation of Churches.
- Endowment of Vicarages upon Appropriation.
- Augmentation of Vicarages.
- Dissolution of Vicarages.

SECT. 2.—*Origin of the Appropriation of Churches.*

For the first six or seven centuries (*c*), the *parochia* was the diocese or episcopal district, wherein the bishop and his clergy

(*a*) God. p. 185; Lind. p. 117, gloss *e.* on *personatibus*, "Est enim istud nomen, *persona*, vulgare *Anglicorum*," &c.

(*b*) 1 Inst. p. 300 b.

(*c*) This introductory sketch is taken from Kennett, "The case of impropriations and of the augmentation of vicarages and other insufficient cures," ed. 1704; afterwards cited in this work as Kennett on Impropriations.

lived together at the cathedral church; and whatever were the tithes and oblations of the faithful, they were all brought into a common fund, from whence a continual supply was had, for support of the bishop and his college of presbyters and deacons, and for the repair and ornaments of the church, and for other suitable works of piety and charity. So that before the distribution of England into parishes (as the word is now used) all tithes, offerings and ecclesiastical profits whatsoever, did entirely belong to the bishop and his clergy for pious uses, and by their original nature could not be in the hands of any layman, or be employed to any secular purpose. This community and collegiate life of the bishop and his clergy appears to have been the practice of our British, and was again appointed for the model of our Saxon churches.

History of
appropriation.

While the bishops thus lived amongst their clergy, residing with them, in their proper seats or cathedral churches; the stated services, or public offices of religion, were performed only in those single choirs; to which the people of each whole diocese resorted, especially at the more solemn times and seasons of devotion. But to supply the inconveniences of distant and difficult access, the bishop sent out some presbyters into the remoter parts, to be itinerant preachers, or occasional dispensers of the word and sacraments. Most of these missionaries returned from their holy circuit to the centre of unity, the episcopal college, and had there only their fixed abode; giving the bishop a due account of their labours and successes in their respective progress. Yet some few of the travelling clergy, where they saw a place more populous, and a people zealous, built there a plain and humble conveniency for divine worship; and procured the bishop to consecrate it for an oratory or chapel at large, not yet for a parish church, or any particular congregation, to be confined within certain bounds and limits. And while the necessities of the country were thus upon occasion supplied, it did not alter the state of the ecclesiastical patrimony; which still remained invested in the bishop for the common uses of religion, as devoted solely to God and his clergy.

The division of a diocese into rural parishes, and the foundation of churches adequate to them, cannot be ascribed to any one act, nor indeed to any one single age.

Several causes and persons did contribute to the rise of parochial churches. Sometimes the itinerant preachers found encouragement to settle amongst a liberal people, and (by their assistance) to raise up a church, and a little adjoining manse. Sometimes the kings, in their country villas and seats of pleasure or retirement, ordered a place of worship for their court and retinue, which was the original of royal free chapels. Very often the bishops, commiserating the ignorance of the country people, took care for building churches, as the only way of planting or keeping up Christianity amongst them. But the more ordinary and standing method of augmenting the number of churches

depended on the piety of the thanes or greater lords; who, having large fees and territories in the country, founded churches for the service of their families and tenants within their dominion. It was this gave a primary title to the patronage of laymen: it was this made the bounds of a parish commensurate to the extent of a manor: it was this divided the several portions of the same church, according to the separate interest of the several lords: and it was this distinct property of lords and tenants, that by degrees allotted new parochial bounds, by the adding of new auxiliary churches.

This first designation of parish churches did not at all break in upon the right of the bishop, either in respect of spirituals or temporals. For the bishop had still the proper cure of souls within his whole diocese, and a title to all the ecclesiastical revenues; and it was by his authority and consent, that parish churches and priests were so ordained, as helps and assistants given to him.

The earlier edition of this work contained (as Dr. Burn's work did) a further historical quotation from Kennett at great length, giving his view of the origin of compulsory tithe and of the assignment of such tithe in full to the parish church of the parish in which it arose. Some points in this history have always been matter of controversy; and quite recently Lord Selborne has given reasons for qualifying Kennett's views (*d*). It is thought sufficient in this work to state here that all writers agree that at latest by the end of the twelfth century, or the date when the canons of the third Lateran Council (A.D. 1179, 1180) were received into England, parishes had become definitely created (*e*) with churches and incumbents instituted by the bishop; and that as a rule the parish church and its incumbent was endowed with the tithes arising from all lands within the limits of the parish, this rule being so general an one that the law presumed such an endowment unless proof was given to the contrary (*f*).

Origin of
parish
churches.

And so much concerning the original appropriation of churches. We come next to consider more particularly the endowment of vicarages consequent thereupon.

An appropriation is the annexing of a benefice to the proper and perpetual use of some religious body politic, which thereby becomes perpetual incumbent. At first, appropriations were made to sole corporations spiritual, as abbots, priors, &c., who could perform divine service in person but were afterwards extended to corporations aggregate, who discharged that function by a vicar (*g*). But though appropriations can only be made to spiritual persons who are bound to provide for the

Appropriation and impropriation, what.

(*d*) Lord Selborne, *Ancient Facts and Fictions concerning Church and Tithes*, Part II., Chap. X., §§ 2, 7.

(*e*) Vide *supra*, p. 125.

(*f*) Selden on *Tithes*, ch. vii.

§ 1; ch. ix. § 4; ch. xi. § 1 (ed. 1618), pp. 142, 260, 297.

(*g*) *Grendon v. Bp. of Lincoln*, Plow. pp. 496, 497; 1 Black. Com. ed. Christian, 1809, p. 385.

service of the church and thereby become perpetual parsons (*h*), yet divers grants of parsonages, &c., were made by the crown at different times to laymen, and particularly by Henry VIII., which are confirmed by statute 31 Hen. 8, c. 13, ss. 18, 19. And these are called impropriations, though the terms appropriate and impropriate are sometimes used indiscriminately, as in the statute 29 Car. 2, c. 8.

The *actores fabule*, as they were called by Dyer, in an appropriation, are the patron, king and ordinary; for it was necessary that the patron should obtain the king's licence in chancery and the consent of the ordinary, as both the king and ordinary had an interest in lapses (which, after the act of appropriation could not take place), and were also considered to be proper guardians of the rights of the church. If the benefice was full, it was necessary to have the concurrence of the incumbent, to give the appropriation immediate effect (*i*).

The term impropriate is used as synonymous with appropriate in 1 Eliz. c. 19 (*k*). In a petition to parliament, temp. Henry VIII., the term is impropriated. "Churches in proper use" is the term in 15 Ric. 2, c. 6. An impropriation (*l*), of which there are or were in England three thousand eight hundred and forty-five, is properly so called when it is in the hands of a layman; and an appropriation is when it is in the hands of a bishop, college, religious house, or the like; though sometimes these terms are confounded and used promiscuously. Lord Stowell said (*m*),—

"It must be evident to any one who considers the history of impropriations, that a lay rector cannot have cure of souls: and the statutes (*n*) of dissolution having directed that impropriations should be held by laymen as they were held by the religious houses from which they were transferred, it may be convenient that this point should be a little more fully considered.

"There is some confusion in the books in not always distinguishing between two sorts of appropriation which were fundamentally different. Appropriations are an abuse which took their rise in the darker ages. They are termed usually in the canon law '*annexiones, donationes, uniones*,' &c., and the term *appropriation*, which was borrowed from the form of such grant '*in proprios usus*,' appears to have been peculiar, or principally confined to England. Ducange cites a letter from England, in which it is used (*o*). It is seldom, indeed, to be found in any foreign canon without reference to this country, and there is scarcely a foreign writer who, in noticing it, does not say, *quas in Anglia vocant appropriationes*.

(*h*) *Wright v. Gerrard*, Hob. p. 307.

(*i*) *Grendon v. Bp. of Lincoln*, Plow. p. 497; 11 Co. pp. 8 a, 11 a.

(*k*) This portion of the statute has now been repealed.

(*l*) Ayl. Par. p. 90.

(*m*) In the case of the *Duke of Portland v. Bingham*, 1 Consist. p. 163.

(*n*) 27 Hen. 8, c. 28; 31 Hen. 8, c. 13.

(*o*) Ducange, Glossary, p. 592.

"There were two sorts of appropriation, or rather appropriation was authorized to be made with different privileges in two forms (*p*), the one *pleno jure, sive utroque jure, tam in spiritualibus quam in temporalibus*, where the interests in the benefice, both temporal and spiritual, were annexed to some religious house, and the other, *non utroque jure*, though *pleno jure*, as it is described, *in temporalibus*, where temporal interests only were conveyed, such as the tithes or patronage of the benefice; but the cure of souls resided in an endowed perpetual vicar.

"In the first species, the religious house had the cure of souls and all rights, and performed the duties of the church by its own members, or by stipendiary curates, and the distinction on this point is summarily described in a passage from the proceedings of the Court of Audience:—'*Cum ecclesia conceditur alicui monasterio, pleno jure, in temporalibus, tunc episcopi debent instituere vicarium perpetuum; ubi vero unitur mensæ episcopali, vel abbatiæ, et spectat ad illam, pleno jure, tam in spiritualibus, quam in temporalibus*,—tunc ponitur in ea presbyter temporalis, ad nutum removibilis, ad exercitium curæ, quæ principaliter residet in eo cujus mensæ est unita' (*q*). This description of these two species of appropriation is to be met with also in frequent passages of the *Aurea summa Hostiensis*, a learned commentator of the thirteenth century (*r*).

"Against holding benefices *pleno et utroque jure*, great complaints were made in the Gallican Church, in which on no subject was dissatisfaction more loudly or more frequently expressed; and it is mentioned, as a fundamental maxim in that church, that, since the Council of Constance (*s*), it has become a legitimate cause of revocation in that kingdom.

"In England it was ordained by the constitution of Othobon that all religious houses which possessed churches *in proprios usus*, should present vicars with competent endowment to the diocesan for institution, within the space of six months; and that if they failed so to do, the bishop was empowered to fill up the vacancy. This, however, proved insufficient against the power of the monks. The civil legislature next interfered, and passed the statutes 15 Ric. 2, c. 6, 4 Hen. 4, c. 12, which

(*p*) X. iii., 33, 3. Panormitan et Hostiensis, in loc. cit.

(*q*) Vicar's Plea, p. 107; Selden on Tithes, ch. 12, § 1; Ayl. Par. p. 86; Lind. pp. 157, 158.

(*r*) "Ubi ecclesia ad monasterium pertinet pleno jure, habet monasterium in eâ institutionem, destitutionem, investituram, fidelitatem, obedientiam, correctionem, et quædam alia: episcopus nihilominus desuper est; nisi privilegium, vel præscriptio, vel contraria consuetudo, obest: sed ubi pleno jure non pertinet, tunc habet ibi monasterium temporalia, et representa-

tionem presbyteri vicarii tantum, qui non debet ab episcopo recipi, nisi per monachos sufficiens portio assignetur." On a further discussion how the bishop could grant such powers *in pleno jure*, being greater than what he himself possessed, the answer is, "non potest transferre, nisi ex causâ, puta, propter paupertatem mensæ religiosorum, quæ non sufficit ad sustentationem ipsorum," &c. Lib. i. p. 296.

(*s*) A.D. 1414. See folio editions of Councils, Paris, 1671, Venice, 1730. Vicar's Plea, p. 4.

require that vicarages should be regularly endowed. Such was the general and legal character of appropriations in England by the canon law, and by the statutes of the realm. The vicarage became a benefice with cure of souls, and the monks held *in proprietatem*, in some sort, as a lay fee" (*t*).

Appropriations to laymen prohibited.

Before the General Council of Lateran, 1179, appropriations might have been made to laymen, but by that council, which was incorporated into the English law, laymen were made incapable of appropriations granted to them (*u*).

Transfers on dissolution of monasteries.

By 29 Hen. 8, c. 28, and 31 Hen. 8, c. 13, the statutes of the dissolution of monasteries, churches appropriate were granted to the king, and his grantees had thereby not only the same interest in the appropriation that the religious houses had, but also an interest by the regal grant of an estate given them by parliament, and consequently had a fee or possession which, when the statutes of dissolution were made, was not of spiritual cognizance while in the hands of the king, and therefore could not be so in those of his patentees.



SECT. 3.—*Endowment of Vicarages upon Appropriation.*

Restrictions by statute.
15 Rich. 2, c. 6.

By 15 Ric. 2, c. 6, "in every licence from henceforth to be made in the chancery, of the appropriation of any parish church, it shall be expressly contained, that the diocesan of the place, upon the appropriation of such churches, shall ordain, according to the value of such churches, a convenient sum of money to be paid and distributed yearly of the fruits and profits of the same churches, by those that shall have the said churches in proper use, and by their successors, to the poor parishioners of the said churches, in aid of their living and sustenance for ever; and also that the vicar be well and sufficiently endowed."

4 Hen. 4, c. 12.

And by 4 Hen. 4, c. 12, "from henceforth, in every church so appropriated or to be appropriated a secular person be ordained vicar perpetual, canonically institute and induct in the same, and covenantally endowed by the discretion of the ordinary, to do divine service, and to inform the people, and to keep hospitality there . . . and no religious be in any wise vicar in any church so appropriated or to be appropriated by any means in time to come."

From henceforth.—This statute extends not to appropriations made before this time (*x*).

Duty of impropiator to maintain priest.

There shall be a Secular Person ordained Vicar Perpetual.—In the case of *Bonsey v. Lee* (1684), it was decreed, that where there is no vicarage endowed, the impropiator of the small tithes is bound to maintain a priest; and upon an information

(*t*) *Duke of Portland v. Bingham*,
1 Consist. pp. 162—165; *Gibs.*
p. 719; *Mallet v. Trigg*, 1 Vern.
p. 42.

(*u*) X. iii. 30, 19; 2 Inst. p. 641.
(*x*) *Britton v. Ward*, 2 Roll.
p. 127.

by the attorney-general for that purpose, the king may assign to the curate such an allowance or proportion of the small tithes as he shall think fit: but otherwise it is, where the vicar is endowed, though but of never so small a matter (*y*).

In appropriated churches, where no vicar has been endowed, the officiating minister is appointed by the appropriator or impropriator, and is called perpetual curate (*z*). Appointment of perpetual curate.

Instituted and inducted.]—Institution and induction seem to be the specific difference between a vicar and a perpetual curate: both can only be in a church that was appropriated. But this must be understood only where the curacy is parochial; for, as to curates of chapels, there seems to be no similitude between them and curates of parishes. But yet it seems this cannot be so: for then *quære*, what is the difference between a donative vicarage and a perpetual curacy? for it is commonly said, that vicarages may be donative, and even rectories may be so. And yet it is contrary to this act that any vicarage, created on an appropriation since the act, should be donative: and therefore donative vicarages must have been such as were made on appropriations before the act, or upon appropriations *ad mensam monachorum*, which are not within the act; and these last, if any such there were, seem to differ only in name from perpetual curacies. A vicar is in for life; a curate, as it seems, at will (*a*). The former is always (*qu.* or at least usually) endowed, the latter never (*b*), except since Queen Anne's bounty (*c*). A donative is always endowed, but a perpetual curacy is never, as it seems (*d*). And if so, then the endowment is a specific difference between a donative vicarage and a perpetual curacy. Note also, where there is a curate, the parson is incumbent; where there is a vicar, the vicar is incumbent (*e*).

Covenably endowed.]—So as without endowment, the appropriation was not good (*f*).

By the Discretion of the Ordinary.]—Before this it could not be done but with the consent of the patron; but there was no necessity of the licence of the king (as in the case of appropriation), because no damage accrued to the crown (*g*).

No Religious shall in any wise be made Vicar in any Church appropriated.]—But if the benefice was given *ad mensam monachorum*, and so not appropriated in the common form, but granted by way of union *pleno jure*; in that case it was served by a monk of their own body, who was removable at their own pleasure. Which is the foundation of our perpetual curacies, where the impropiators are bound to provide divine service, but may do it by a curate, not instituted, but only licensed by the

(*y*) 1 Vern. p. 246.

(*z*) 1 Black. Com. ed. Christian, 1809, p. 388 (n.), 23.

(*a*) *Price v. Pratt*, Bunb. p. 274.

(*b*) *Ibid.*

(*c*) *Vide* 1 Geo. 1, st. 2, c. 10.

(*d*) Bunb. p. 274.

(*e*) Serj. Hill's MSS.

(*f*) *Crimes v. Smith*, 12 Co. p. 4.

(*g*) 2 Roll. Abr. p. 334; *Gibs*, p. 717.

bishop. So the monks served them; and because the acts of dissolution gave the lands to the king in such manner and form as the monks held them, they who derive from the crown have reckoned themselves under no restraint to present a vicar to the bishop for institution. But though the canon law is clear that such benefices as were united *mensæ monachorum* might be served by monks (*h*), without institution; yet the law also was that in case such cures were supplied by seculars they must have institution; and there being now no supply but by seculars, it seems to follow that by law no benefices can be now served by stipendiary curates without institution: but the received practice is otherwise (*i*).

Monks.

It was only in later times that monks were allowed to be ordained by the bishop of the diocese, and were frequently advanced to the highest offices in the church; they were always held to be incapable of a cure of souls without dispensation (*k*). But having succeeded in procuring a vast number of benefices to be appropriated to their religious houses, they were frequently not content with naming clerks to serve them, who were to be ordained, instituted, and governed by the bishop, but thought fit to serve the churches themselves, and often pretended that the government of the bishop was incompatible with the regulations of their orders. These usurpations rendered them unpopular both with the laity and clergy (*l*). In the canon law we find several regulations to secure a fit allowance to the clerks who serve appropriated churches, which allowance might be made a condition of their ordination, and if then neglected might afterwards be assigned by the bishop (*m*). A better, though in order of time a later remedy, was applied here by 15 Ric. 2, c. 6, which, as Dr. Gibson observes, makes a sufficient endowment a condition not of admitting the clerk, but of appropriating the benefice (*n*). This act passed at the earnest complaint of the commons against the abuses of appropriations (*o*).

Act of endowment.

The act of endowment by the bishop might be made either in the act of appropriation, or by a subsequent act and a separate instrument (*p*).

It is to be feared that most of the endowments are now lost, at least to us, by being carried to Rome at the dissolution of monasteries (*q*).

Pension reserved in the act of endowment.

Upon the making an appropriation, an annual pension was reserved to the bishop and his successors, commonly called an indemnity, and payable by the body to whom the appropriation was made. The ground of which reservation, in an ancient appropriation in the registry of the Archbishop of Canterbury,

(*h*) As to nunneries, that was not so. Dugd. Warw. pp. 1041—1043.
 (*i*) Gibs. p. 717; *Jacob v. Dallo*, 6 Mod. p. 230.
 (*k*) Lind. p. 306.
 (*l*) See X. iii. 37; Clem. i., 5, 1; and Ayl. Par. p. 371.
 (*m*) Clem. iii., 12, 1.
 (*n*) Gibs. p. 716.
 (*o*) Rot. Par. 15 R. 2, 38.
 (*p*) Gibs. p. 719.
 (*q*) Johns. p. 239.

is expressed to be, for a recompense of the profits which the bishop would otherwise have received during the vacation of such churches (*r*).

A vicarage by endowment becomes a benefice distinct from the parsonage. As the vicar is endowed with separate revenues, and is now enabled by the law to recover his temporal rights without aid of parson or patron; so has he the whole cure of souls transferred to him by institution from the bishop. It is true in some places both the parson and the vicar used to receive institution from the bishop to the same church, as it is in the case of sinecures, the origin of which was thus: The rector (with proper consent) had a power to entitle a vicar in his church to officiate under him, and this was often done; and by this means two persons were instituted to the same church, and both to the cure of souls, and both did actually officiate. So that however the rectors of sinecures, by having been long excused from residence, are in the common opinion discharged from the cure of souls (which is the reason of the name); and however the cure is said in the law books to be in them *habitualiter* only; yet in strictness of law, and with regard to their original institution, the cure is in them *actualiter*, as much as it is in the vicar (*s*). Sinecures, however, have now been almost entirely abolished.

Vicarage, a distinct benefice.

Sinecures

The parson by making the endowment acquires the patronage of the vicarage. For in order to the appropriation of a parsonage the inheritance of the advowson was to be transferred to the corporation to which the church was to be appropriated; and then the vicarage being derived out of the parsonage, the parson of common right must be patron thereof. So that if the parson makes a lease of the parsonage (without making a special reservation to himself of the right of presenting to the vicarage) the patronage of the vicarage passes as incident to it (*t*). But it was held in the 21 Jac. 1, that the parishioners may prescribe for the choice of a vicar. And before that, in the 16 Jac. 1, in the case of *Shirley v. Underhill*, it was declared by the court that though the advowson of the vicarage of common right is appendant to the rectory, yet it may be appendant to a manor, as having been reserved specially upon the appropriation (*u*).

Patronage.

Lord Stowell, in the *Duke of Portland v. Bingham* (*x*), insists much upon the distinction between a lay and spiritual rector. "Nothing can be more clear" (he observes) "than that he, *i.e.*, the former, has not cure of souls in fact, or in presumption, of law; for as to what is said in some books, that he may have it '*habitualiter*,' it is a distinction which more properly applies to cases of another description where there is a spiritual rector, but '*sine curâ*,' and an endowed spiritual vicar of the same church,

Distinction between lay and spiritual rector.

(*r*) Gibs. p. 718.

(*s*) Gibs. p. 719; *Britton and Ward's case*, Cro. Jac. p. 518; *Clarke v. Pryn*, 1 Sid. p. 426. Vide *infra*, Chap. XII., sect. 4.

(*t*) 2 Roll. Abr. p. 59.

(*u*) Mo., p. 894; Gibs. p. 719. See *Code v. Hulmed*, 2 Roll. p. 304.

(*x*) 1 Consist. p. 162.

who has the '*cura animarum actualiter*,' whilst the other is said to possess it only '*habitualiter*.'" And he does not seem to be certain that the patronage necessarily, *ex vi termini*, belongs to a lay rector. In *Mallet v. Trigg*, Lord Northington said, "There was a great difference as to the parson's right of naming or choosing his vicar, where the parson was of a lay fee, and where he had a cure of souls; for in the latter case, there was reason he should approve of the man who was to act under him in so high a trust" (z). Godolphin says (a), "The vicar is usually appointed and allowed to serve the cure, by him who hath the impropriation of the parochial tithes;" and, "The parson, and not the patron of the parsonage, of common right is patron of the vicarage, for that is derived out of the parsonage: *dubitatur*, 17 Edw. 3, 51, 6; *contra*, 5 Edw. 2, quare impedit, 165, per Pass.; and if a person appropriate create a vicarage, he shall be patron thereof, 17 Edw. 3, 51. He is both parson and patron (b). So likewise if there be a vicar and parson appropriate, the ordinary and the parson appropriate may in time of vacation of the vicarage reunite the vicarage to the parsonage" (c).

Sometimes, upon appropriation, the right of presenting the vicar was given to the bishop, probably to induce his consent, as appears from divers instances.

Vicar only
entitled by
endowment or
prescription.

There were no vicarages at common law: or, in other words, no tithes or profits of any kind do *de jure* belong to the vicar, but by endowment or prescription, which cannot be presumed, but must be shown on the part of the vicar. For which reason the payment of tithes to the parson was *primâ facie* a discharge against the vicar (d).

Vicarages are usually supposed to have begun in the eighth year of Henry III.; but they are to be met with as early as the time of King John. It would seem there is an instance of the appointment of a perpetual vicar in the reign of Henry II. (e).

Authority of
endowments.

The first endowment of the vicar could not be prescribed against by the parson. This was adjudged in the case of *Pringe v. Child* (2 Jac. 1) (f).

Prescription
where the
endowment
is lost.

The loss of the original endowment was supplied by prescription; that is, if the vicar had enjoyed this or that particular tithe by constant usage, the law would presume that he was legally endowed with it by the same reason that it presumed some tithes might be added by way of augmentation, which were not in the original endowment (g).

(z) 1 Vern. p. 42.

(a) God. p. 197.

(b) See 2 Roll. Abr. p. 334.

(c) Mich. 7 Jac. B. R., *Stafford's case*.

(d) Gibs. p. 719; *Britton and Ward's case*, Palm. p. 113; *Grene v. Austen*, Yelv. p. 86; *Wharton v.*

Lisle, 4 Mod. p. 184.

(e) See *Britton and Ward's case*.

(f) Noy, p. 3; Mo., pp. 761,

780. See Gibs. p. 720.

(g) Gibs. p. 720; *Borgham v. Robson*, 2 Keb. p. 729; *Tavimey v. Brazenose College*, Hardr. p. 328.

It has been said that all compositions for the endowments of vicarages shall be expounded by the judges of the common law, and if the spiritual courts meddle with that matter, they are to be prohibited (*h*).

But where the dispute is between rector and vicar, being both spiritual persons, it seems that the proper cognizance of the cause belongs to the ecclesiastical judge (*i*).

G., vicar, sues in the Ecclesiastical Court the dean and chapter of Wells, parson of a church, for a pension, and they pray a prohibition; and it was denied, for that pension is a spiritual thing, for which the vicar may sue in the spiritual court (*k*). So, too, in the *Vicar of Halifax's case*, where a chaplain sued a vicar for a salary, and the latter applied for a prohibition, partly on the ground that prescription for salary was triable at common law, it was said by Yelverton, "The salary is spiritual as well as the cure itself is spiritual, for which it is to be paid" (*l*).

In the case of *Drake v. Taylor*, the vicar libelled for tithes of turnips, and laid his title to them by prescription and endowment. The defendant pleaded that there is a rectory impropriate, and that time out of mind the rector has taken tithes of turnips; and he moved for a prohibition and obtained a rule unless cause showed; and it was insisted that in this case both the parties are not ecclesiastics, for the libel is against a parishioner, and it lays a custom which is denied and must be tried by the common law. But by Parker, Chief Justice, and the court: Though both parties are not ecclesiastics, yet the thing in controversy belongs either to one ecclesiastic or another, for either the rector is entitled to the tithes or the vicar, and what matter is it to the parishioner who has them, for he can only pay them to one. This is properly a dispute what belongs to the vicar upon the endowment, and that evidence which will entitle him to a sentence below will not enable him to recover here; and if we should grant a prohibition in order to try the custom, yet that will not determine the question upon the endowment, and, therefore, we ought not to draw them out of that court, which may properly determine the whole matter. And, besides, in the Spiritual Court fifty years make a prescription, though they will not here. And the rule for a prohibition was discharged (*m*).

It sometimes happens that there is a lay impropiator and no vicar but a perpetual curate, in which case it seems that the rights of the former are very extensive. The following opinion of Lord Stowell was given upon a case laid before him while an

Trial of
endowments.

Lord Stowell's
opinion as to
the rights of
a lay impro-
priator where

(*h*) Wats. c. 39, p. 403; Litt. p. 263.

(*i*) *Bushe's case*, 2 Brownl. p. 36.
See, however, *Blinceo v. Marsen*,
Mo. p. 457.

(*k*) *Goodwin v. Dean and Chapter*

of *Wells*, Noy, p. 16.

(*l*) See, too, *Taverner's case*, Dyer,
p. 58, 6.

(*m*) 1 Stra. p. 87. See *Cheeseman*
v. Hevey, Willes, p. 680.

there is no
vicar.

advocate. It related to the chapel of Hot Wells, Clifton. But the main questions were as to the extent of the rights of a lay impropriator where there was no vicar, and as to his power of conveying away a parcel of such rights. The facts of the case may be sufficiently inferred from the opinion as to the points of law which were raised upon its consideration.

Opinion.

(1.) "The title to the possession of the curacy and to future presentation seems to me to be free from objection, as far as I can judge of it; but for greater certainty, I would advise Mr. Taylor (perpetual curate, and possessed by deed of the right to nominate perpetual curate) to take the opinion of an eminent practiser in Chancery or conveyancer; matters of title being within their peculiar province, and the title to this sort of property is governed by same rules on which titles to other property depend.

(2.) "I must observe that Mr. Womall's (the impropriator's) rights are very differently described in this case: in the query, it is said he is entitled only to the tithes; but in the body of the case it is stated, that in his conveyance he takes not only 'tithes great and small, but likewise all oblations, conventions, and offerings to the impropriate parsonage belonging.' I should therefore conceive that he is completely seised of the impropriate parsonage, with the exception of the right to the nomination to the curacy, the chancel vault, and the garden and paddock tithes conveyed to Mr. Taylor. In all other respects I presume he is impropriator, with all rights; and the rights of an impropriator, where there is no vicar, but only a perpetual curate, are certainly very extensive. These rights may be restrained by the particular local custom and usage: and the perpetual curate has in many cases acquired an extensive possession of the soil of the churchyard. But I take it that of common right it belongs to the impropriator, and unless the curate can show use and possession against him, the title of the impropriator is better than that of the curate.

(3.) "The power of granting the churchyard ground for the enlargement of the chancel belongs to the bishop, with the consent of the impropriator (to whom the chancel undoubtedly belongs), and with the consent likewise of the parish, who have a right and interest in the churchyard for the purpose of sepulture: this consent of the parish will be implied if they do not oppose the grant of a faculty.

(4.) "Though Mr. Womall has granted away the chancel vault, he is still entitled to all the parts of the chancel save the vault; for, being originally entitled to the whole, he is still entitled to every part which he has not parted with by express alienation.

(5 and 6.) "And with respect to the property of fees in the churchyard and the right of planting trees therein, these will depend upon the question, Who is the proprietor of the soil? I do not think that Mr. Taylor is entitled to the soil by virtue of his purchase, for he has purchased only the nomination to the curacy, the chancel vault, and the garden and paddock tithes. If he is entitled, it must be not as patron of the curacy, but as being actual curate; and I have already observed that, in order to determine that point, Mr. Taylor must ascertain the rights of exclusive ownership [? which] have been exercised in this churchyard by predecessors, the curates. If he cannot show any, I am afraid it will be difficult to maintain his title against the impropiator. Care should have been taken by Mr. Taylor in the original purchase to include all these rights.

(7.) "If by pews are meant the pews in the body of the church, I do not think that Mr. Womall has any right therein. They belong to the parish, subject to the authority of the ordinary. I do not see any pretence of right that Mr. Womall can have to call upon any person there to exhibit his title. In the chancel he may have a power of disposing of pews, subject, however, to the control of the ordinary, if he exercise that power improperly.

(8.) "It is impossible to dispossess Mr. Taylor himself of his curacy; but supposing that the right of nomination could be wrested from him, and a curate appointed who was not of his nomination, I think the consent of that curate might be held necessary to the performance of divine service in that chapel.

(9 and 12.) "Appear to be the same. I think that Mr. Taylor, uniting in himself the rights of perpetual curate of the parish and likewise of proprietor of this chapel, by virtue of having built it (though I observe that in the petition to the bishop it is mentioned to have been built partly by the contributions of divers persons), is not obliged to keep this chapel open; though if other persons were contributors, and have an interest therein, they would have a right to share in any new application that might be made of this building.

(10.) "I think the application of sacramental money perfectly proper (partly to repair of church, partly to the poor).

(11.) "I do not think that anybody is subject to an obligation of rebuilding this chapel if it be burnt down.

(13.) "Question.—Can Mr. Taylor put a lock upon the open seats and benches within an inclosure, and demand payment previously to admitting people?

"I think Mr. Taylor has a legal right to do what is suggested, because I do not see that anybody has a right to claim seats in this chapel, excepting, perhaps, the representatives of those who contributed to the erection. I need not recommend Mr. Taylor to use his legal rights with caution and moderation.

"W. M. SCOTT."

C. J. Mansfield's opinion on same case.

Mr. (afterwards Lord Chief Justice) Mansfield was consulted upon the same case, and gave the following opinion:—

"I think it very doubtful whether any conveyance of a right to nominate the curate separate and distinct from the rectory can be good in law. The nomination of a curate being a duty incumbent upon the impropriate rector, and to be enforced against him if the service of the church is neglected, by a sequestration of the right of the rectory. Otherwise it was a good conveyance.

"J. MANSFIELD,"

"Temple, Feb. 2, 1796."

Construction of vicar's endowment.

The Courts of Equity frequently determined upon the interpretation of endowments.

Any words in an endowment being doubtful, were to be interpreted by practice, and to the advantage of the vicar. So, in the case of *Barsdale v. Smith*, though *garba* in the common acceptation relates to corn, yet it appearing that the custom had been for the vicar to have tithe hay, this was adjudged sufficient to extend it to tithe hay (*n*). And the same thing was adjudged in the case of tithe wood, as given by the term *altaragia*, upon the same foundation of custom, in the case of *Renoulds v. Green* (*o*); or, if given there under the name *minutæ decimæ*, custom changes a great tithe, as wood is, into small. Upon the occasion of which case, it was said, that the word *altaragium* shall be expounded according to use. And Bishop Stillingfleet observed, that in the settlement of the altarage of Cockrington by Grossthead, bishop of Lincoln, not only oblations and obventions, but the tithes of wool and lamb, were comprehended under that name (*p*).

And in the case of *Franklyn v. The Master and Brethren of St. Cross* (1721), it was decreed, that where *altaragium* is mentioned in old endowments, and supported by usage, it will extend to small tithes, but not otherwise (*q*).

The most difficult, though most common question, that related to the interpretation of endowments was, what the vicar should have in virtue of the phrase *minutæ decimæ* (*r*).

On this point a number of cases have been decided, which are given in the note (*s*), but of which it is not necessary now, since the Tithe Commutation Acts, to make further mention.

(*n*) Cro. Eliz. p. 633. See *Sir Edward Crooke's case*, 2 Roll. p. 161.

(*o*) 2 Bulst. p. 27.

(*p*) Gibs. pp. 719, 720. See *Twiss v. Brazenose College*, Hardr. p. 328; and Roll. Abr. pp. 334, 335.

(*q*) Bunb. p. 79.

(*r*) Gibs. p. 720.

(*s*) *Higham v. Beast*, Owen, pp. 58, 74; *S. C.*, nom. *Higham v. Best*, Cro. Eliz. p. 463; 2 Roll. Abr.

p. 335; *Imman v. Wharmby*, 1 Y. & J. p. 545; *Tythes*, Lofft, p. 66; *Hiscocks v. Wilmot*, Gow, p. 147; *Wooley v. Birkenshaw*, 12 Price, p. 702; *Lady Dartmouth v. Roberts*, 16 East, p. 334; *Apperley v. Gill*, 1 C. & P. p. 316; *Wooley v. Brownhill*, McClell. p. 321; 13 Price, p. 500; *Bullen v. Michel*, 2 Price, p. 399.



SECT. 4.—*Augmentation of Vicarages.*

Dr. Gibson says: "It seems to be agreed on all hands, that the ordinary hath power to oblige spiritual impropriators to augment vicarages: according to the case of *Hitchcot v. Thornborough* (9 Car. 1), where the vicar sued the tenant of the master of the choristers of the church of Sarum (the said master being parson), for addition of maintenance in the spiritual court; and prohibition was denied, upon this reason, that the ordinary might compel the parson to an augmentation, there being such a power reserved to him in all appropriations; and that the lessee (who held for lives according to the statute of the 32 Hen. 8) came in, subject to the same charge (t).

Dr. Gibson's
view of the
law.

"'Tis true, this was an appropriation which had never come to the king by any statute of dissolution: but that circumstance, of having been conveyed to the king, made no difference with regard to the jurisdiction of the bishop, so long as they were reconveyed to a spiritual hand, as appears from the case of the dean and chapter of St. Asaph (12 Jac. 1) (u). The only question then is, concerning his" [the bishop's power] "over lay impropriators."

In favour of this he proceeds to give several reasons.

But notwithstanding all this, it must be acknowledged that nothing is more peremptorily delivered throughout the books of common law, than the contrary doctrine; namely, that since the dissolution, all impropriations (at least in the hands of laymen) are become mere lay fees, or inheritances of a mere temporal nature (v), from whence it is inferred, that therefore all such possessions are entirely freed from the spiritual jurisdiction: and particularly that the ordinary has no power to make augmentation of a vicarage, out of any rectory which is in the hands of a lay impropriator (x).

The common
opinion on
this subject.

In *Lutton v. King* it was said that before 31 Hen. 8, a vicar might libel in the spiritual court for an augmentation of his vicarage, for upon the creation of vicarages that power was commonly reserved, and where it was not reserved the bishop could not augment them and libels for that purpose were frequently exhibited against impropriators; but now, since by that statute impropriations are made lay fees, the ordinary cannot intermeddle, neither could they have sued for tithes in the spiritual court, if that power was not particularly saved to them by the statute. But there seems to be a difference where a vicar sues a lay impropriator, and where the impropriator is a

(t) Gibs. p. 722; 2 Roll. Abr. p. 337.

(u) See 2 Roll. p. 100.

(v) *Walwyn v. Awberry*, 2 Ventris, p. 35; 2 Mod. p. 257, by which it appears that the case, *Beverham v.*

Osborn, in 3 Keb. p. 829, which says that the court spiritual may grant sequestration on an impropriate parsonage, is ill reported. See also Wats. c. 39, p. 401; c. 43, p. 468.

(x) Gibs. p. 723.

spiritual person, for in the last case it is probable he may sue for an augmentation; and in some cases, where the impropriation is not a lay fee, as in the case of the choristers of Salisbury, where the appropriation of a parsonage was made to them before the statute, and continues so still, and in such case the bishop may make an augmentation, if that power is reserved for the persons who are subject to his command (*y*).

Modern practice as to.

In practice, however, the only augmentations that are now made, are either by private benefaction, or by Queen Anne's bounty, or by the Ecclesiastical Commissioners (*z*).



SECT. 5.—*Dissolution of Vicarages.*

Britton v. Ward.

Vicarages, though duly created and of long continuance, might be dissolved. The great case in which this point came under consideration was that of *Britton v. Ward* (16 Jac. 1) (*a*). An appropriation had been made in the time of King John, and so continued till the reign of Henry VI., when upon the prior's petition to the pope, in regard the priory was poor, the pope granted by his bulls, that for the future the prior should appoint one of his monks to officiate in the cure, who should be removable at the will of the prior. And this was holden to be a good dissolution, because the appropriation, having been made before 15 Rich. 2 and 4 Hen. 4, was not within those statutes. But Doderidge and Haughton, Justices, held, that if the appropriation had been within the said statutes, neither pope nor ordinary could have dissolved the vicarage: for if they could be supposed to have that power, the great design of the statute of 4 Hen. 4 (namely, to have a vicar perpetually incumbent), might be defeated at pleasure. And though such a power of dissolution were supposed to be consistent with that statute, it seems by no means reconcilable with the disabling statute of 13 Eliz. c. 10, against the granting or conveying the possessions of vicars, as well as of others, in any other manner than that statute directs (*b*).

Parry v. Banks.

But notwithstanding those two statutes, and the opinions of the two learned judges aforesaid, when the case of *Parry v. Banks* (*c*) was brought into the Exchequer in the twelfth year of the same king, where a vicarage was endowed upon an appropriation to the dean and chapter of St. Asaph, and in the 24 Eliz. was dissolved by the bishop, and united to the rectory, it was held by the barons that the dissolution was good (*d*), because the appropriation being to the dean and chapter, and so

(*y*) 3 Salk. p. 377.

(*z*) Vide infra, Part IX., Chaps. II., III., IV.

(*a*) Cro. Jac. p. 515; 2 Roll. pp. 97, 127; Palm. pp. 113, 219.

(*b*) Gibs. p. 720.

(*c*) 2 Roll. p. 100; Palm. p. 114.

(*d*) See the true reason in the notes to 17 Vin. Abr. p. 304, pl. 6.

remaining in a spiritual hand which was capable of the cure, it might well be dissolved. And this appropriation being one of those which came into the king's hands in the 31 Hen. 8, and by the king transferred to the dean and chapter, the court further resolved that if the impropriation had become a lay fee in the hands of a temporal possessor, the vicarage could not have been dissolved, because that would be in effect to destroy the cure (c).

Two things more are delivered in the books of common law concerning dissolution of vicarages and the union thereof to their rectories:—1. That though a vicarage is taken out of the parsonage, and (for the poverty and necessity thereof) may be dissolved and reunited, to supply the parsonage; yet the not presenting for a long time (as for 160 years, which was the case in the books), shall not be a discontinuance of the vicarage (f); but something ought to be shown of the act of reuniting. 2. If a vicarage is to be dissolved into a parsonage presentative, the king's licence is not necessary, because no loss accrues to the crown; but if it is to be dissolved into a parsonage appropriatory, there must be the king's licence, because he for ever loses his title by lapse (g).

Further
requisites by
the common
law.

If the parson appropriate who is patron of the vicarage of the same church, presents the vicar to the parsonage, this is a reunion of the vicarage to the parsonage, so that the presentee shall have all the tithes and other profits of the church (h). Per Windham, J., all appropriations are preternatural, and the church during such time is in bondage, and therefore by presentation is made presentative (i).

Presentation
of vicar to
parsonage.

The usual form of the endowment of a vicarage was to this effect:—

Universis Christi fidelibus præsens scriptum visuris vel audituris: Robertus permissione divina Carliolensis ecclesie minister humilis, salutem in Domino sempiternam. Cum nos ad taxationem perpetuæ vicariæ ecclesie de Orton nostræ dioceseos vocati, priori et conventui ecclesie de Cunninshed prædictæ ecclesie rectoribus quod taxationi prædictæ interessent, si sibi viderint expedire, autoritate apostolica præcepissemus; ac super valorem prædictæ ecclesie eadem autoritate per viros fide dignos ad hoc juratos et examinatos plenarie inquisitiones fecissemus; prædictus prior pro se et conventu suo in presentia nostra constitutus, quoad taxationem prædictam ordinationi nostræ totaliter se submisit. Nos igitur invocata Spiritus Sancti gratia, prædictis facultatibus pensatis prædictæ ecclesie, autoritate præ-

Form of
endowment.

(c) Gibs. p. 720.

(f) For the not presenting a vicar is the default of the parson, of which he ought not to take advantage. *Robinson v. Bedel*, Cro. Eliz. p. 873.

(g) *Austin's case*, Cro. Jac. p. 518; Gibs. p. 720.

(h) Wats. c. 17, p. 199.

(i) *Wilkinson v. Richardson*, 1 Keb. p. 906.

dicta, in prædictæ ecclesiæ vicariam perpetuam taxamus quatuor libras et quatuordecim solidos. Pro prædicta summa pecunie, perpetuæ assignamus eidem vicariæ portiones inferius scriptas; videlicet, duas mansiones, cum duabus bovatis terræ, cum omnibus earundem easmentis et pertinentibus omnimodis infra villam et extra ad easdem mansiones cum duabus bovatis terræ ad ipsas spectantibus, quæ propinquiores sunt ecclesiæ prædictæ; et omnes obrentiones, mortuaria viva et mortua, et eorum optima vestimenta; oblationes, videlicet, die omnium sanctorum, die natalis Domini, die purificationis beate Mariæ, et die paschalis; in nuptiis, obitibus, purificationibus, et in omnibus aliis devotionibus dictæ ecclesiæ prorenientibus; nec non lance et agnorum, et si oves et agni ante festum sancti Martini in hyeme non tondeantur, vel post dictum festum quovis casu fortuito moriantur, decimæ solvantur debito modo et exigantur; lini, et cannabis, et molendinorum, et alias minutas decimas boscorum, pannagii sylvarum, et aliarum arborum si vendantur, stagnorum, columbariorum, hortorum, turborum in locis quibus fodiuntur, aucarum, et anatum, ovorum et pullorum, nec non porcellorum, apium mellis et cereæ, artificiorum, negotiationum, nec non stipendiorum, et omnium proventuum rerum aliarum, de cætero satisfaciant ecclesiæ prædictæ competenter, ut de jure teneantur; et etiam decimas garbarum prædictarum duarum bovatarum terræ prædictæ vicariæ assignatarum. (Exceptis decimis albis pullinorum et vitulorum, decima feni, nec non et decima propriorum omnium prædicti prioris et conventus in prædicta parochia existentium, cui quas rectori volumus assignari.) Ita quod vicarius qui pro tempore fuerit omnia onera ordinaria et extraordinaria pro portione ipsi contingente, videlicet, pro tertia parte, plenarie sustinebit. Ipso vero vicario cedente vel decedente, prædicti prior et conventus liberam habeant facultatem ad eandem vicariam clericum idoneum præsentandi. In cujus rei testimonium præsentī scripto sigillum nostrum apponi fecimus; datum apud Romam septimo idus Aprilis, anno Domini millesimo ducentesimo sexagesimo tertio, et pontificatus nostri anno quinto.

SECT. 6.—*Conversion into Rectories.*

By 3 Geo. 4, c. 72, it is enacted as follows:—

In cases in which the rectorial tithes, &c. shall be surrendered by impro-priators, &c., for the purpose of converting vicar-

Sect. 13. "It shall be lawful for the said commissioners (*k*) and they are hereby authorized and empowered to convert any vicarage of any parish or place, or the separate divisions of any vicarage of any parish or place, divided under the said recited acts or this act into a rectory or rectories instead of a vicarage or vicarages, in any case in which the owner or owners entitled in fee simple to the rectory or tithes, if an inappropriate rectory, or

(*k*) That is, the church building now transferred to the ecclesiastical commissioners, whose powers are commissioners.

the patron entitled in fee simple of a sinecure rectory, and also the incumbent of the sinecure rectory, of any such parish or place, if the same shall not be void at the time of any such conversion, and the person or persons (if any) entitled to the absolute interest in any lease granted of the sinecure rectory or glebe or tithes thereof, shall be willing to restore and release and re-unite the tithes and glebe and all other rectorial rights, dues and emoluments of any such parish or place, or of any such proportion of any such parish or place as shall be satisfactory to such commissioners, to the incumbent or incumbents of such parish or parishes, or place or places, and his or their successors for ever; and in every such case such surrender, restoration, or release shall be made in such form and by such instrument as the commissioners shall direct; and the said commissioners shall, by an instrument in writing under the seal of the said commissioners, direct such alteration to be made, and conversion of any such vicarage or vicarages into a rectory or rectories, from the period specified in such instrument, and upon the conditions as to the transfer, restoration, or re-uniting of tithes, glebe, or other rectorial rights, dues and emoluments therein mentioned; which instrument shall be registered in the registry of the diocese in which the parish shall be locally situate, and enrolled in the High Court of Chancery; and such parish or parishes, place or places, shall for ever therefrom be deemed and taken to be, to all intents and purposes, a rectory or rectories, without prejudice nevertheless to the rights and interests of any other persons; and the incumbent or incumbents of any such vicarage or vicarages shall thereupon become and be deemed to be the rector or rectors of such parish or parishes, or divided parishes or place or places, without any new induction or proceeding whatever, and shall be entitled to have and use and exercise all such remedies for the recovery of their tithes, glebe and all other rectorial rights, dues and emoluments, as rectors of such parishes or divided parishes, as fully and effectually, to all intents and purposes, as if such parishes had been rectories, and such incumbents respectively had been in due form of law inducted as rectors therein; and it shall be lawful for the said commissioners in every such case, immediately after the passing of this act, and before any such transfer and division can be finally arranged, made and completed, to accept and confirm any such restoration or release and re-union of any such tithes, and accept and record the consents or engagements in relation thereto, of any such impropiator, patron, or sinecure rector and incumbent (if there shall have been any incumbent to consent at the time of such conversion) and tenant or tenants, if any, and to proceed to the completing of any such transfer or division upon such consent, for the purpose of converting any such vicarage into a rectory or rectories; and all such consents shall in any such case be valid and binding upon the heirs and

ages into rectories, the commissioners shall direct the same to be done accordingly.

successors, and executors and administrators respectively of any such impropriator, patron, or sinecure rector and incumbent, tenant or tenants, if any death or changes shall thereafter occur in any such patronage or incumbency, as fully and effectually to all intents and purposes as if the consent had been given and transfer made by the impropriator, patron, or sinecure rector and incumbent, tenant or tenants for the time being, when the arrangement and division shall be finally completed: Provided always, that no incumbent shall in any such case become liable to the maintenance or upholding or repair of more than one house of residence in any such parish or place; and when in any such parish or place there shall be more than one house belonging to the church or chapels thereof, the bishop of the diocese shall decide, order and declare which shall thereafter be deemed the house of residence, and be upheld and maintained and repaired as such; and the order of the bishop in relation thereto shall be registered in the registry of the diocese, and a duplicate copy of such order deposited and be kept in the chest of the church or chapel of such parish or place."

Sinecure rector may release part of rectorial glebe, &c., and retain the remainder in fee simple, for the purpose of converting any vicarage into a rectory by the commissioners.

Sect. 14. "In case the said commissioners shall think proper to convert into a rectory or rectories the vicarage of any parish or place, or separate division of a parish or place which shall be divided, or in which a new church shall be erected by virtue of the provisions contained in the said recited acts or this act, and the possessor or possessors of the sinecure rectory of such parish or place for two or more lives, by virtue of a lease granted thereof by a rector with the consent of the patron and ordinary, shall be desirous of retaining any manor or other hereditaments, being the glebe or part of the glebe of the said rectory, and shall be willing to surrender and release all his, her, or their estate and interest in the tithes, and the residue (if any) of the glebe of the said rectory, on condition that such manor and other hereditaments shall be vested in him, her, or them in fee simple, then and in every such case it shall be lawful for the said commissioners, and they are hereby authorized and empowered, if they shall think proper, with the consent of the patron of the said rectory being entitled thereto in fee simple, and the incumbent thereof, by any instrument under the seal of the said commissioners, and sealed and delivered by the said patron and incumbent (if any) upon the execution by such possessor or possessors of the said rectory, together with the patron and incumbent (if any) thereof, and of the said commissioners, of such instruments as are hereinbefore mentioned or referred to, for surrendering, releasing, and vesting all the rectorial tithes and glebe (except the manor and other hereditaments to be retained as aforesaid), to release and convey the said manor and other hereditaments to such possessor or possessors of such other person or persons as he, she, or they shall in that behalf direct, his, her, or their heirs and assigns for ever; and such instruments in writing shall be enrolled in the High Court of

Chancery, and upon the execution thereof the manor and other hereditaments comprised therein, with their appurtenances, and the fee simple and inheritance thereof, shall be "absolutely vested in the person or persons to whom the same should be thereby released and conveyed, his, her, or their heirs and assigns for ever, but shall be subject to tithes in the same manner as if the same had never been part of the glebe of the said rectory."



SECT. 7.—*Some miscellaneous Points.*

By 1 & 2 Vict. c. 106, s. 35:—

"In all cases of rectories having vicarages endowed or perpetual curacies, the residence of the vicar or perpetual curate in the rectory house of such benefice shall be deemed a legal residence to all intents and purposes whatever: provided that the house belonging to the vicarage or perpetual curacy be kept in proper repair to the satisfaction of the bishop of the diocese."

Vicar or perpetual curate may reside in rectory house.

Sect. 61 abolished the old oath of residence formerly taken by the vicar.

By 31 & 32 Vict. c. 117, s. 2:—

"The incumbent of the church of every parish or new parish for ecclesiastical purposes, not being a rector, who is or shall be authorized to publish banns of matrimony in such church, and to solemnize therein marriages, churchings and baptisms according to the laws and canons in force in this realm, and who is or shall be entitled to take, receive and hold for his own sole use and benefit the entire fees arising from the performance of such offices, without any reservation thereof, shall from and after the passing of this act, for the purpose of style and designation, but not for any other purpose, be deemed and styled the vicar of such church and parish or new parish, as the case may be, and his benefice shall for the same purpose be styled and designated a vicarage."

Incumbents of certain parishes to be vicars.

It has been holden by the Court of Queen's Bench and the Exchequer Chamber that, though the freehold of a parish church may be in the lay rector, the right of possession of the chancel and of the body of the church is in the minister and churchwardens; and therefore a lay rector cannot maintain trespass against the vicar for breaking open a door leading from the churchyard into the chancel (1).

Right of vicar in chancel.

It sometimes happens that there have grown up two benefices, each with separate incumbents, both rectors, in one church and

Medieties.

(1) *Griffin v. Deighton*, 5 B. & S. p. 93; 33 L. J., Q. B. p. 181. See *Perry v. Webb*, Arches Court, 1876, not reported.

parish. Such benefices are called medieties (*m*), each incumbent having as it were half the cure of souls. In some cases there are even more than two incumbents (*n*). Provision has been made for the gradual extinction of medieties, and for apportioning the duties (*o*).

(*m*) Vide infra, p. 267.

(*n*) Vide infra, Chap. XIV., 2 & 3 Vict. c. 30, at p. 362, infra.

sect. 2.

(*o*) Vide infra, p. 415. See also

CHAPTER X.

CURATES, MINISTERS, DONEES.

- SECT. 1.—*Curates generally.*
 2.—*Perpetual Curates.*
 3.—*Ministers of Chapels of Ease.*
 4.—*Ministers of Proprietary Chapels.*
 5.—*Donees.*

SECT. 1.—*Curates generally.*

It is to be remarked that the generic term curate appears in its original sense to have comprehended all clerks who had cure of souls, and it bears this signification in the rubrics of our Prayer Book, as in the rubric preceding the Administration of the Lord's Supper, where it is said, "So many as intend to be partakers of the Holy Communion shall signify their names to the Curate at least sometime the day before;" and in the prayer "for the Bishops and Curates." "*Persona (a)*, (Lyndwood, using the word in the sense of Parson, says,) *dicitur quandoque curator alicujus ecclesiæ parochialis.*"

Meaning of
"curate."

Curates in our Church are now of two kinds:—

1. Temporary or stipendiary curates, the spiritual assistants of a rector or vicar, by whom they are employed and paid. They may officiate in a parish church or chapel of ease in the parish of the rector or vicar. Their *status* is so much connected with the general subject of benefices that they will be considered in their relations to the ordinary and the rector or the vicar, in a chapter subsequent to that on the law appertaining to benefices.

Different
kinds of
curates.

2. Permanent or perpetual curates, the clerks who officiate in parishes or districts to which they are nominated by the impropriators, and licensed by the bishop (*b*).

Something has been already said on the rights of the lay impropriator where there is a perpetual curate (*c*). We will now consider a little more closely the *status* of this class of beneficed clerk.

(*a*) Lind. p. 117, note (*c*); Gloss on *personatibus*, citing Guido de Baiapho, Archidiaconus Bononiensis, who flourished A.D. 1300.

Acts have a position analogous to that of perpetual curates. Vide supra, p. 216; infra, Part IX., Chaps. V., VI.

(*b*) Some ministers in districts created under the Church Building

(*c*) Vide supra, p. 228.

SECT. 2.—*Perpetual Curates.*

Origin of
perpetual
curacies.

The origin of perpetual curacies in this country was thus:—By the statute 4 Hen. 4, c. 12, already referred to, it is enacted, that in every church appropriated there shall “a secular person be ordained vicar perpetual, canonically institute and induct in the same, and covenantably endowed by the discretion of the ordinary.”

But if the benefice was given *ad mensam monachorum*, and so not appropriated in the common form, but granted by way of union *pleno jure*; in that case it was served by a temporary curate belonging to their own house, and sent out as occasion required. The like liberty, of not appointing a perpetual vicar, was sometimes granted by dispensation, in benefices “not annexed to their tables,” in consideration of the poverty of the house, or the nearness of the church. But when such appropriations, together with the charge of providing for the cure, were transferred (after the dissolution of the religious houses) from spiritual societies to single lay persons, who were not capable of serving them by themselves, and who by consequence were obliged to nominate some particular person to the ordinary for his licence to serve the cure; the curates by this means became so far perpetual, as not to be wholly at the pleasure of the appropriator, nor removable but by due revocation of the licence of the ordinary (*e*).

Land annexed
to perpetual
curacy cannot
be leased by
curate, so
as to bind
successor,
without
consent of
ordinary and
patron.
Not within
old law of
pluralities.

It has been settled, by a decision of the Court of Queen's Bench, that land annexed to a perpetual curacy by the governors of Queen Anne's Bounty, under 1 Geo. 1, stat. 2, c. 10, ss. 4—21, cannot be leased by the curate, so as to bind the successor, if the patron only consent, and not the ordinary (*f*).

A perpetual curacy is not an ecclesiastical benefice (*g*), but was under the old law tenable with any other benefice: So held in *Weldon v. Green*, 1772, adjudged by Sir George Hay in a suit by the patron against his clerk incumbent, who had accepted such a curacy after his institution and induction into the benefice; which this suit was intended to make void (*h*), as, by the ecclesiastical law, the acceptance of any ecclesiastical benefice, of ever so small value, without a dispensation, makes any former ecclesiastical benefice void (*i*).

Subject to
dilapidations.

A perpetual curate is liable like any other beneficed clerks for dilapidations (*k*).

(*e*) *Gibs*. p. 819; *Duke of Portland v. Bingham*, 1 Consist. p. 165.

(*f*) *Doe d. Richardson v. Thomas*, 9 A. & E. p. 556; 1 Per. & Dav. p. 578. See also *Doe d. Bramall v. Collinge*, 7 C. B. p. 939; 13 Jur. p. 791.

(*g*) See *Jenkinson v. Thomas*, 4 T. R. 665.

(*h*) *Ex relatione* Lord Stowell to Mr. Serjeant Hill.

(*i*) See *Arthington v. Bp. of Chester*, 1 H. Bl. pp. 425—431; *Korne Demandant*, 3 Taunt., p. 463.

(*k*) *Mason v. Lambert* (1848), 12 Q. B. p. 795; 12 Jur. p. 1045. See now the Ecclesiastical Dilapidations Act, 1871 (34 & 35 Vict. c. 43), § 3; and vide *infra*, Part V., Chap. V., sect. 2.

There are some decided cases of which it is difficult to say whether they relate principally to the category of perpetual curates or of the curates of chapels of ease. For instance, the case of *Herbert v. Dean and Chapter of Westminster*, 1721. In consequence of the plague which happened in the year 1625, the churchyard of St. Margaret's, Westminster, not being large enough to bury the dead parishioners, the inhabitants of that part of that parish which resorted to the new chapel built there, petitioned the dean and chapter of Westminster (who were lords of the manor and rectors appropriate of the parish) to grant them a waste piece of ground to bury their dead, which accordingly the dean and chapter did under their seals, and it was solemnly consecrated. Afterwards, these inhabitants were at the charge of building a chapel there, having first obtained a royal licence for that purpose. The vestrymen and chapelwardens had, ever since the year 1653, elected the ministers who were to preach there; but now the dean and chapter of Westminster claimed a right to name the minister who should preach and do divine service in this chapel. On a bill brought apparently by the vestrymen and chapelwardens to settle the right of nominating the parson of this chapel, Lord Macclesfield, Lord Chancellor, on an interlocutory application, seems to have inclined in favour of the plaintiffs. But afterwards, on the hearing, he decreed that the right of nomination of the minister did belong to the dean and chapter (l).

*Herbert v.
Dean, &c. of
Westminster.*

In *Dixon v. Kershaw*, Lord Northington held that whenever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary which gives a compensation to the incumbent of the mother church, or a prescription, in which everything is presumed to have been proper (m). And in that case, though the chapel was erected and endowed by a grant of lands from the lord and freeholders of a manor, and though the right of nomination was given by the archbishop in the deed of consecration to the inhabitants, and the vicar of the mother church at the time declared he had no right to nominate, and though the inhabitants had repaired and nominated for ninety years, his lordship decreed the right of nomination to belong to the vicar, as there was no agreement by deed between the bishop, patron, and incumbent, nor evidence of a prescriptive title in the inhabitants.

*Dixon v.
Kershaw.*

There are various other cases in which, according to the special circumstances proved, the inhabitants of a parish have or have not been holden to be entitled to nominate the perpetual curate or the minister of a particular chapel (n).

Right of
nomination.

(l) 1 P. Wms. p. 773.

(m) Amb. p. 528.

(n) *Faulkner v. Elger*, 4 B. & C. p. 449; *Arnold v. Bp. of Bath and Wells*, 5 Bing. p. 316; *Ken. Paroch. Ant.* p. 589; *Att.-Gen. v. Forster*, 10

Vesey, p. 335; *Farnworth v. Bp. of Chester*, 4 B. & C. p. 555; *Att.-Gen. v. Parker*, 3 Atk. p. 541; *Att.-Gen. v. Newcombe*, 14 Ves. p. 1; *Att.-Gen. v. Brereton*, 2 Ves. pp. 425, 427; *Ves. Suppl.* p. 396.

Augmented
perpetual
curacies.

Dr. Burns observes that, with regard to such of the perpetual curacies as have been augmented by the governors of Queen Anne's bounty, there is no doubt but by the act of parliament here next following, the curates thereof are not removable at pleasure. That is, by 1 Geo. 1, stat. 2, c. 10, s. 4, which makes all augmented churches perpetual cures and benefices and the ministers thereof bodies politic.

Perpetual
curacies are
benefices.

And as to the rest, it should seem that such curacies are *beneficia ecclesiastica*. Lord Coke says, *beneficium* is a large word, and is taken for any ecclesiastical promotion or spiritual living whatever (*p*). And Dr. Gibson, observing upon the case of *Wood v. Birch* (*q*), where it was held that the curate was removable at the will of the parson, and consequently could not prescribe, says this is true of an assistant curate to a resident rector or vicar, but not of a curate properly speaking, who has the *curam animarum* committed to him *pro tempore* by the bishop in the absence of the incumbent (*r*). And in the case of perpetual curacies in particular, the Court of King's Bench will grant a mandamus to the bishop to admit and licence a curate, which implies a right in the person nominated to such office of promotion; as was done by the court in the case of the dean and chapter of Carlisle with respect to the curacy of St. Cuthbert's.

It only implies a right until the will is determined; for another at will may have a mandamus (*s*).

The reasons which have sometimes induced the Court of King's Bench to refuse a mandamus in this case have arisen from the nature of that writ. But that a perpetual curacy was to be considered as a benefice with cure of souls, and that the curate must therefore have obtained the bishop's licence, and subscribe the Thirty-nine Articles and declaration of conformity, before he can be admitted to his benefice and maintain an action of money had and received for the profits of it, was the opinion of the Court of King's Bench in *Powel v. Milbank* (*t*). This case was afterwards litigated in the Court of Common Pleas.

Present sub-
scriptions and
declarations.

By the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), sects. 5, 7, 9, the same oaths and declarations are required of one about to be licensed to a perpetual curacy as of one about to be instituted to a rectory or vicarage (*u*).

1 Geo. 1, c. 10.
Chapels of
ease and per-
petual
curacies
augmented.

The 4th section of 1 Geo. 1, stat. 2, c. 10, referred to above, after reciting as follows:—Whereas the late Queen Anne's "bounty to the poor clergy was intended to extend not only to parsons and vicars who come in by presentation or collation, institution, and induction, but likewise to such ministers who come in by donation, or are only stipendiary preachers or curates . . . most of which are not corporations, nor have a

(*p*) 2 Inst. p. 29.

(*q*) Nom. *Birch v. Wood*, 2 Salk.
p. 506.

(*r*) Gibs. p. 896.

(*s*) 2 Salk. pp. 428, 429.

(*t*) 1 T. R. p. 399.

(*u*) Vide infra, Chap. XI., sect. 7.

legal succession, and therefore are incapable of taking a grant or conveyance of such perpetual augmentation" as is intended by the said bounty; "and in many places it would be in the power of the donor, impropiator, parson or vicar to withdraw the allowance now or heretofore before paid to the curate or minister serving the cure; or in case of a chapelry, the incumbent of the mother church might refuse to employ a curate . . . and might officiate there himself, and take the benefit of the augmentation . . . and the maintenance of the curate or minister would be thus sunk instead of being augmented:" enacts in substance that all such churches, curacies, or chapels which shall be augmented by the governors of the said bounty, shall be from henceforth perpetual cures and benefices, and the ministers duly nominated and licensed thereunto shall be in law bodies politic and corporate, and have perpetual succession, and be capable to take in perpetuity; and the impropiators or patrons of any augmented churches or donatives, and the rectors and vicars of the mother churches whereunto such augmented curacy or chapel doth appertain, shall be excluded from receiving any profit by such augmentation, and shall pay to the ministers officiating such annual and other pensions and salaries, which by ancient custom or otherwise of right but not of bounty they were before obliged to pay.

And by sect. 6, for continuing the succession in such augmented cures hereby made perpetual cures and benefices, and that the same may be duly and constantly served, if they shall be suffered to remain void for six months, they shall lapse in like manner as presentative livings. Lapse.

By 2 & 3 Vict. c. 49, s. 2, "In the case of any church or chapel which has already been or hereafter may be augmented by the said governors of the bounty of Queen Anne, and for or to which any district chapelry has already been or hereafter may be assigned, whether before or after such augmentation under the provisions of the said recited acts or some of them, such church or chapel, from and after such augmentation and the assignment of such district chapelry, shall be and is hereby declared to be a perpetual curacy and benefice; and the minister duly nominated and licensed thereto, and his successors, shall not be a stipendiary curate, but shall be and esteemed in law to be a perpetual curate, and a body politic and corporate, with perpetual succession, and may receive and take to himself and his successors all such lands, tenements, tithes, rentcharges, and hereditaments as shall be granted unto or purchased for him or them by the said governors of the bounty of Queen Anne or otherwise; and such perpetual curate shall henceforth have within the district chapelry so assigned as aforesaid sole and exclusive cure of souls, and shall not be in any wise subject to the control or interference of the rector, vicar, or minister of the parish or place from which such district chapelry shall have been taken, any law or statute to the contrary notwithstanding."

2 & 3 Vict.
c. 49.

Any augmented church or chapel having a district to be a perpetual curacy, and the minister to be an incumbent with perpetual succession, &c., and to have exclusive cure of souls within the district.

Sect. 5 saves all the powers and privileges given by 1 Geo. 1, stat. 2, c. 10.

Qualification and nomination of incumbents.

By these statutes the augmented chapels, being expressly made perpetual cures and benefices, if the incumbents of such chapels have not before such augmentation been qualified, or qualified themselves, according to the requisites above specified for perpetual curates, it may be advisable, upon such augmentation made, that they be nominated *de novo*, and then perform the several particulars within the time required, which nomination may be in this or the like form:—

Form of nomination.

“To the right reverend father in God, C. lord bishop of —, A. B. of —, gentleman, sendeth greeting: Whereas the curacy of the chapel of —, in the county of —, and in your lordship’s diocese of —, is augmented, or shortly intended to be augmented, by the governors of the bounty of the late Queen Anne, for the augmentation of the maintenance of the poor clergy; by reason whereof it is requisite that a curate should be duly nominated and licensed to serve the said cure, pursuant to the statute in that case made, I, the said A. B., do hereby nominate C. D., clerk (the person employed by me in serving the said cure), to be curate of the said chapel of —, and do humbly pray your lordship to grant him your licence to serve the said cure, and to perform all divine offices therein accordingly. In witness whereof I have hereunto set my hand and seal, the — day of —, in the year of our Lord —” (x).

Rights of perpetual curate in his chapel.

The perpetual curate of an augmented parochial chapel may maintain trespass for entering the chapel and destroying pews (y). The chapelwarden of such a chapel may not, without the consent of the perpetual curate, remove pews (z). It is a question of fact in each case whether a perpetual curate has possession of the churchyard for other than spiritual purposes (a).



SECT. 3.—*Ministers of Chapels of Ease.*

Chapels of institutions.

The position of ministers of chapels belonging to any college school, hospital, asylum or public or charitable institution is now regulated by the terms of a bishop’s licence granted under the act 34 & 35 Vict. c. 66, and will be found treated of later (b). When by long use and custom parochial bounds became fixed and settled, many of the parishes were still so large that some

Origin of curates in chapels of ease.

(x) Ecton, p. 460.

(y) *Jones v. Ellis*, 2 Y. & J. p. 265.

(z) *Ibid.*

(a) *Greenslade v. Darby*, L. R. 3 Q. B. p. 421.

(b) *Infra*, Part VI., Chap. III., sect. 5.

of the remote hamlets found it very inconvenient to be at so great a distance from the church, and, therefore, for the relief and ease of such inhabitants, a method obtained of building private chapels or oratories, in which a capellane was sometimes endowed by the lord of the manor, or some other benefactor, but generally maintained by a stipend from the parish priest (c).

But in order to authorize the erecting of a chapel of ease, the joint consent of the diocesan, the patron and the incumbent (if the church was full) were all required (d). Consents necessary.

The form of a nomination to a chapel of ease may be to this effect :— Form of nomination to a chapel of ease.

“To the right reverend father in God — lord bishop of — A. B. of — &c. sendeth greeting: Whereas the curacy of — in the county of — and diocese of — is now void by the death of C. D. last incumbent there, and doth of right belong to my nomination: These are humbly to certify your lordship that I do nominate E. F. clerk to the curacy aforesaid; requesting your lordship to grant him your licence for serving the said cure. In witness whereof I have hereunto set my hand and seal, the — day of — in the year of our Lord —.”

On this subject Sir John Nicholl gave the following opinion: Opinion of Sir J. Nicholl.

“A chapel for the performance of public worship according to the liturgy of the Church of England cannot be opened without the consent of the bishop, the minister of the parish, and, I think, the patron of the living, and such chapel should be consecrated. A clergyman performing divine service in such a chapel as is suggested, without a licence, is liable to be punished with ecclesiastical censures, and upon repeating the offence, I apprehend that suspension might be inflicted. J. NICHOLL, 1795.”

And in several cases which came before him as judge he laid down the law to the same effect (e).

The latest is *Bliss v. Woods* (f), in which he said:

Bliss v. Woods.

“I conceive that by the general law and customs of the Church of England no person has a right to erect a new public chapel, forming part of the ecclesiastical establishment of the Church of England, whether as a chapel of ease or otherwise, without the concurrent consent of incumbent, patron, and ordinary, and without a provision for the indemnity or compensation of the future incumbent, perhaps in all cases, certainly if his pecuniary rights and interests are to be in any way affected.”

Dr. Lushington adopted this statement of the law in *Williams v. Brown* (g).

Ministers or curates of such chapels are capable of augmentation by Queen Anne's bounty (h). Augmentation.

It is not necessary in order to prevent a lapse that the appoint- No lapse.

(c) Ken. Paroch. Ant. p. 587.

(d) Ibid. p. 585.

(e) *Carr v. Marsh*, 2 Phillim. p. 198; *Moysey v. Hillcent*, 2 Hagg.

Eccl. p. 30; vide infra, sect. 4.

(f) 3 Hagg. Eccl. at p. 509.

(g) 1 Curt. p. 53.

(h) See p. 242, supra.

ment be within six months; for if the patron of a curacy do not nominate a clerk, there can be no lapse thereof (except in the case of the curacy having received the augmentation of Queen Anne's bounty), but the bishop may compel him to do it by spiritual censures (*i*).

This was declared to be law in the case of *Farchild v. Gayre*, with regard to donatives (*k*), because though the church is exempted from the power of the ordinary, yet the patron is not; and it holds much more strongly in the case of curacies, where both church and patron are subject to the ordinary's jurisdiction, and where therefore he may likewise sequester the profits and appoint another to take care of the cure, till the patron shall nominate a fit and proper clerk (*l*).

Whether a mandamus will lie to admit or restore a curate.

Ree v. Blooev.

In *Ree v. Blooev* (*m*) a mandamus was moved for to restore a claimant to his position, it was said, as incumbent of a donative, but it seems clearly to have been only the case of a chapel of ease under the mother church, both from the vicar and also the inhabitants claiming the right of nomination, and especially from the bishop's licence being obtained, which is contrary to the nature of a donative. It was thus:—A mandamus was moved for to be directed to one Samuel Blooev, a parishioner of Matfield, in Staffordshire, and an inhabitant of the chapelry of Calton within that parish (who had turned Mr. William Langley, the curate of that chapel, out of it after he had been eleven weeks in possession, and locked it up), commanding him to restore the said William Langley, clerk, to the place and office of curate of the said chapel. It appeared that this chapel was endowed with lands, and that the inhabitants of four different parishes contributed to the repair of it. The curate of it had a stipend. The vicar of Matfield swore in his affidavit that he believed he had the right of nomination to it, and that it had been executed, and that Mr. Langley was appointed and nominated by him. But there were contrary affidavits, wherein the deponents swore that they believed the right of nomination to be in the inhabitants. It appeared that Mr. Langley had a licence. Lord Mansfield, Chief Justice: "A mandamus to restore is the true specific remedy where a person is wrongfully dispossessed of any office or function which draws after it temporal rights; in all cases where the established course of law hath not provided a specific remedy by another form of proceeding; which is the case with regard to rectories and vicarages." And the rule was made absolute for a mandamus. No return was made to it, but the parties agreed to try the merits on a feigned issue. The issue seems to have been tried, but the result is not stated.

Upon this case being afterwards mentioned, the court took occasion to say, "That they had reconsidered the point, and

(*i*) 1 Inst. p. 344; Gibs. p. 819.

(*k*) Cro. Jac. p. 63.

(*l*) Gibs. p. 819.

(*m*) 2 Burr. 1043; and see *Ree v. Barker*, 3 Burr. 1265.

weighed all the principles and authorities applicable to it; and were fully satisfied that the properest and most effectual method of trying the right to officiate in such chapels, whether it depended upon nomination or election, was by mandamus."

Nevertheless the authority of this case has been much shaken by subsequent decisions. It was observed by Mr. Justice Buller, in *Rex v. The Bishop of Chester*, that the grounds on which the Court of King's Bench formerly granted or refused a mandamus, are not explicitly stated; but the court had lately granted this discretionary writ only in cases where there was no other specific legal remedy, or where such remedy (as an assise) was obsolete. In the last-mentioned case, there was a cross nomination to a curacy, and one of the nominees applied to the court for a mandamus to the bishop to licence him, which the court refused, because he had a specific legal remedy by *quare impedit* (n). This reasoning seems also to have been adopted in a later case of *Rex v. The Marquis of Stafford*. The affidavits in that case stated the usage to be, that the minister of the chapel of Willenhall ought to be nominated and appointed by the inhabitants of the town of Willenhall, having lands of inheritance within the town, and being so nominated, ought to be presented and allowed by the lord of the manor of Stowe Heath. That on a commission of charitable uses, in the reign of James I., it was agreed between the lord of the manor and the said inhabitants, that certain copyhold lands should be let, through the medium of trustees, for the reparation of the said chapel and the maintenance of a stipendiary priest or curate, to be nominated by a majority of the said inhabitants, and to be allowed by the lord, and by him presented to the ordinary for a licence to preach. The lord having refused to allow and present the nominee of a majority of the inhabitants, the latter prayed a mandamus, which the court refused, saying their right was either a mere trust, and then their remedy was in equity, or it was a legal right, in which case a *quare impedit* would lie (o).

Rex v. Bishop of Chester.

Rex v. Marquis of Stafford.

To every of the several kinds of curates or ministers the ordinary's licence is necessary before he shall be admitted to officiate. Licence.

For by Canon 48 of 1603, "No curate or minister shall be permitted to serve in any place without examination and admission of the bishop of the diocese or ordinary of the place having episcopal jurisdiction, under his hand and seal; having respect to the greatness of the cure and meetness of the party. And the said curates and ministers, if they remove from one diocese to another, shall not be by any means admitted to serve without testimony of the bishop of the diocese, or ordinary of the place as aforesaid, whence they came, in writing, of their honesty, ability, and conformity to the ecclesiastical laws of the Canon 48.

(n) 1 T. R. p. 396.

(o) 3 T. R. p. 646.

Church of England. Nor shall any serve more than one church or chapel upon one day, except that chapel be a member of the parish church or united thereunto; and unless such the said church or chapel where such a minister shall serve in two places, be not able in the judgment of the bishop or ordinary as aforesaid to maintain the curate" (*p*).

Requisites
before a
licence can
be obtained.

In order to which,

(1) He must produce his nomination in form aforesaid.

(2) Then it must appear in the next place, that he is in holy orders: of deacon at least, if he is to be licensed to be an assistant curate; and of priest, if he is to be licensed to a perpetual curacy; for by 14 Car. 2, c. 4, s. 10, no person shall be admitted to any benefice or ecclesiastical promotion before he shall be ordained priest; and it is the more necessary in this case, because he is the sole incumbent in the parish; and by the same statute, until he shall be ordained priest, he may not consecrate the sacrament of the Lord's Supper. Which words benefice or promotion do also extend to all chapels of ease which have received the augmentation of Queen Anne's Bounty; for by 1 Geo. 1, stat. 2, c. 10, s. 4 (*q*), it is expressly declared that they shall from thenceforth, that is, from the time of such augmentation, be perpetual cures and benefices.

And this must appear to the ordinary, either of his own knowledge or by lawful testimony.

Thus by a constitution of Archbishop Reynold, "No person shall be admitted to officiate until proof shall first be made of his lawful ordination" (*r*).

And by a constitution of Archbishop Arundel, "No curate shall be omitted to officiate in any diocese wherein he was not born or ordained, unless he bring with him his letters of orders" (*s*).

(3) By the same constitution of Archbishop Reynold, "No person shall be admitted to officiate until proof shall first be made of his good life and learning" (*t*).

And by the aforesaid constitution of Archbishop Arundel, "No curate shall be admitted to officiate in any diocese, wherein he was not born or ordained, unless he bring with him letters commendatory of his diocesan, and also of other bishops in whose dioceses he hath continued for any considerable time; which letters shall be cautious and express with regard to his morals and conversation, and whether he be defamed for any new opinions contrary to the catholic faith or good manners" (*u*).

(4) He must under the law till quite recently have taken the oath of allegiance and supremacy (*x*), for by the 1 Eliz. c. 1, s. 10, every person who shall be promoted to any spiritual or

(*p*) See *Gates v. Chambers*, 2 Add. p. 177, as to application of this canon to preachers generally.

(*q*) See p. 242, *supra*.

(*r*) Lind. p. 47.

(*s*) Ibid. p. 48.

(*t*) Ibid. p. 47.

(*u*) Ibid. p. 48. See Gibs. p. 896; and *Bp. of Exeter v. Marshall*, L. R. 3 H. L. p. 17.

(*x*) Contained in 21 & 22 Vict. c. 48.

ecclesiastical benefice, promotion, dignity, office or ministry, shall, before he take upon him to receive, exercise, supply, or occupy the same, take the said oaths before such person as shall have authority to admit him. But this qualification has been removed by the Promissory Oaths Act, 1871 (34 & 35 Vict. c. 48); and it seems that a curate does not come within the words of 28 & 29 Vict. c. 122 (*y*).

(5) But such of the said curates as are admitted to a benefice with cure are to take all the oaths and declarations that are required of persons to be admitted to any benefice by 28 & 29 Vict. c. 122 (*z*).

(6) By Canon 36 of 1865, modifying Canon 36 of 1603, no person shall be suffered to preach, catechise, or to be a lecturer, or reader of divinity, in any parish church, chapel, or other place, except he be licensed either by the archbishop or by the bishop of the diocese, or by one of the two universities; and except he shall first subscribe the declaration of assent to the Thirty-nine Articles and Book of Common Prayer, which is the same as that given in 28 & 29 Vict. c. 122, s. 1 (*a*). Canon 36.

And by Canon 37 of 1865, modifying Canon 37 of 1603, "None licensed as is aforesaid to preach, read, lecture, or catechise, coming to reside in any diocese, shall be permitted there to preach, read, lecture, catechise, or minister the sacraments, or to execute any other ecclesiastical function, by what authority soever he be thereunto admitted, unless he first make and subscribe the declaration aforesaid, in the presence of the bishop of the diocese wherein he is to preach, read, lecture, catechise, or administer the sacraments as aforesaid." Canon 37.

By the 11th article of Archbishop Wake's injunctions it is required, that in licences to be granted to serve any cure, the ordinary shall cause to be inserted, after the mention of the particular cure provided for by such licence, a clause to this effect, "or in any other parish within the diocese, to which such curate shall move with the consent of the bishop (*b*)."

Also after licence obtained, it seems that they shall take the oath of canonical obedience, if thereunto required. Thus by a constitution of Archbishop Winchelsea, "To curates received to officiate in any church, it ought to be enjoined in virtue of their obedience, that they duly attend on Sundays and holidays and other days when divine service is to be performed; and thereupon we do injoin, that oath shall be administered and made at their admission: and we do injoin, that they shall also make oath that they will not injure the rectors, or vicars, and governors of the churches or chapels wherein they shall officiate; but that they will humbly obey them, and give them due reverence" (*c*).

Requisites
after licence
obtained.

(*y*) See p. 242, *supra*, and Chap. XI., sect. 7, *infra*. The act seems only to apply to benefices which are the subject of institution or collation, and to perpetual curacies.

(*z*) See Chap. XI., sect. 7, *infra*.

(*a*) Given in full at p. 103, *supra*.
(*b*) But this is not now used; vide *supra*, pp. 114, 116.

(*c*) Lind. pp. 70, 71.

Stipendiary
priests.

There is another constitution of the same archbishop, as to stipendiary priests, who shall celebrate the divine offices (*d*).

But this constitution seems to have been intended, not with respect to curates in general, but only such of them as had salaries appointed by particular founders, for praying for the souls of them and their friends or posterity; for such were the stipendiary priests, who officiated in chantries founded and endowed for the purposes aforesaid.



SECT. 4.—*Ministers of Proprietary Chapels.*

Such chapels
anomalies.

Unconsecrated proprietary chapels are anomalies unknown to the ecclesiastical constitution, which have grown up in the last two centuries.

Ministers
require licence
and incum-
bent's consent.

The ministers of such chapels require the licence of the bishop, which may be revoked by him at any time, and which cannot be granted by him without the consent of the incumbent of the parish. Further, any new incumbent has a right to signify his dissent to the licence, and thereby effectually to forbid the minister from further officiating.

The following are the cases upon this subject :—

*Keate v. Bp. of
London.*

In *Keate v. Bishop of London* (*e*), Keate was libelled against in several articles at the promotion of the rector of St. George's, Hanover Square, for baptising, marrying, and administering the sacrament in a chapel in the parish without a licence from the bishop, and for collecting money in the chapel in the offertory, and not paying the said money to the minister or churchwardens of the said parish.

The court discharged a rule for showing cause why a prohibition should not go, for these are matters of spiritual cognisance.

*Trebec v.
Keith.*

This is probably the same case as that reported in a later stage as *Trebec v. Keith*, Feb. 12, 1742. Mr. Keith, minister of May Fair Chapel, which was a chapel of ease to St. George's parish, Hanover Square, of which the plaintiff was rector, being cited into the Bishop of London's court, for officiating as a clergyman of the Church of England without being licensed by the bishop, and having been denounced excommunicate forty days, for contumacy and contempt of the ecclesiastical laws, upon the bishop's certificate into chancery of this fact, the writ *de excommunicato capiendo* issued. It was moved to quash the writ, and one of the suggestions was, that Mr. Keith was within the Toleration Act. But by the Lord Chancellor Hardwicke: "The act of toleration was made to protect persons of tender

(*d*) Lind. pp. 110, 114. See Johnson, *Canons*, vol. ii. pp. 322, 323.

(*e*) Serj. Hill's MSS.

consciences, and to exempt them from penalties; but to extend it to clergymen of the Church of England, who act contrary to the rules and discipline of the church, would introduce the utmost confusion." And the exception was overruled (*f*).

In *Moysey v. Hillcoat* (*g*), a chapel being built shortly before 1735 by private subscription, and the subscribers agreeing out of the pew rents to pay the rector of the parish a yearly stipend for performing divine service, a licence was obtained from the bishop to the rector and his successors, who from time to time performed therein parochial duties; but there being no proof of consecration, nor of any composition between the patron, incumbent, and ordinary, such chapel was held merely proprietary, and the minister, nominated by the rector of the parish, could not perform parochial duties therein, nor distribute the alms collected at the Lord's Supper (*h*).

*Moysey v.
Hillcoat.*

The case of *Hodgson v. Dillon* decided that the bishop has the power of revoking absolutely and discretionally licences to officiate in unconsecrated chapels. During the course of this judgment, Dr. Lushington said, "I think that the principle on which the law of the Church of England stands in this matter is this, no clergyman whatever of the Church of England has any right to officiate in any diocese in any way whatever as a clergyman of the Church of England unless he has a lawful authority so to do, and he can only have that authority when he receives it at the hands of the bishop, which may be conferred in various ways; as by institution in the case of a benefice, by licence where the party is a perpetual curate, and by licence when the clergyman officiates as stipendiary curate . . . I need not say the ancient canon law of this country knew nothing of proprietary chapels or unconsecrated chapels at all. The necessity of the times, the increase of population, and want of accommodation in the churches and chapels in the metropolis and other large towns, gave rise to the erection of chapels of this kind, and to the licensing of ministers of the Church of England to perform duty therein. The licence emanates from his episcopal authority; he could not, however, grant such a licence without the consent of the . . . rector or vicar of the parish." The learned judge proceeded to say that the bishop may revoke such licence whenever he thinks fit, according to a discretion not examinable by the ecclesiastical judge; and that it is not in the power of the bishop to estop himself from such a remedy, or to confer a permanent right against himself (*i*).

*Hodgson v.
Dillon.*

In *Richards v. Fincher* (*j*), Sir Robert Phillimore held that a licence by the bishop, granted with the consent of the incumbent, was invalid against a succeeding incumbent; and that the latter could prohibit the minister of the proprietary chapel from further officiating.

*Richards v.
Fincher.*

(*f*) 2 Atk. p. 498.

(*g*) 2 Hagg. Eccl. p. 30.

(*h*) See also *Carr v. Marsh*, 2

Phillim. p. 198.

(*i*) 2 Curt. p. 388.

(*j*) L. R. 4 Adm. & Eccl. p. 255.

Jones v. Jelf.

26 & 27 Vict.
c. 82.

English
services in
Wales.

Bishop on
certain appli-
cations and
under certain
conditions
may license
chapel for
English
services.

The case of *Jones v. Jelf* (*k*), gave rise to the act next following.

It is an act empowering the bishops of Welsh dioceses to facilitate the provision of English services in the Welsh-speaking parts of Wales (26 & 27 Vict. c. 82).

By sect. 1, "The bishop of the diocese, on an application in writing from ten or more inhabitants of any parish, district or place, setting forth their desire to have divine service and the administration of the sacraments in English, their undertaking to provide a building for a chapel, and a clerk to officiate, and to pay all expenses of the service, may, if he thinks there is not sufficient provision for divine service in English, and on the incumbent's nominating a fit minister, license from year to year or for any term not exceeding two years, such building as a chapel, and such minister as the minister thereof, for the performance of divine service, preaching, and the administration of the sacraments in English."

In case of dis-
agreement,
incumbent to
have notice
of bishop's
intention to
license, and
an appeal to
the arch-
bishop.

By sect. 2, "If the incumbent refuse to nominate such a minister, or if any disagreement as to the sufficiency of the services, the provision for their performance or for the minister, or in respect of the competency of the minister, arises between the persons applying to the bishop and the incumbent, the bishop after three months from the receipt of the application (if due notice of the application has been given by the persons applying to the incumbent) may signify in writing to the incumbent the name of a minister whom he intends to nominate to the chapel. If the incumbent does not within fourteen days object, the bishop may nominate and license. If he does object, the bishop shall refer the nomination to the archbishop, and the licence shall not be granted without the archbishop's approval in writing."

Building not
to have paro-
chial rights.

By sects. 3, 4, "The licensed building shall not, without the assent of the incumbent, be a parochial chapel; the minister shall have no power to perform any pastoral or ministerial functions other than those specified in his licence; and the rights of the incumbent as to publication of banns, solemnization of marriages, and performance of burials, or to offertories, fees, dues, or emoluments, shall not be affected.

Donative,
what.

SECT. 5.—*Donces.*

A donative is a spiritual preferment, be it church, chapel, or vicarage, which is in the free gift or collation of the patron, without making any presentation to the bishop; and without admission, institution, or induction by any mandate from the bishop

or other; but the donee may, by the patron or by any other authorized by the patron, be put into possession (*l*).

And this right in the donor (together with the exemption of the church from ecclesiastical jurisdiction) seems to have come from the consent of the bishop in some particular cases (*m*); as when the lord of a manor in a great parish, having his tenants about him at a remote distance from the parish church, did offer to build and endow a church there, provided that it should belong entirely to him and his family, to put in such persons as they should think fit, if they were in holy orders. It is very possible that the bishops at that time, to encourage such a work, might permit them to enjoy this liberty; which being continued time out of mind, is turned into a prescription. And they are to be distinguished from those called sinecures, and exempt jurisdictions; for sinecures in truth are benefices presentable; but by means of vicarages endowed in the same places, the persons who enjoy them have by long custom been excused from residence; and exempt jurisdictions are not so called, because they are under no ordinary; but because they are not under the ordinary of the diocese, but have one of their own, and are therefore called peculiars (*n*).

Origin of
donatives.

There is not any one particular sort of ecclesiastical preferences, that are peculiarly said to be donatives; for some of all sorts may be donative, as well as presentative or elective. For bishoprics were donative in England after the Conquest, until the time of King John. So a prebend may be donative, as at Windsor and Westminster, in the chapels of the king, where the prebend being void, it is said the king shall make collation of his clerk by patent, and by force thereof he shall take possession without any institution or induction. Also a benefice with cure of souls may be a donative, as was the rectory of Briery or Burien in Cornwall till a recent act (*o*); and so the church of the Tower of London is a cure of souls, and the king's donative (*p*).

Of what kind
of benefices or
dignities.

Yet some of these instances, and other such like, may be said to resemble donatives, rather than to be donatives, properly so called: such as the grant of the king to prebends without institution; as also, the collation of a bishop without presentation; and the nomination to perpetual curacies, which is without either presentation, institution, or induction. For these differ

(*l*) Degge, bk. 1, c. 13; *Fayrechild v. Gayre*, Mo. p. 765; *S. C. nom. Farchild v. Gayre*, Cro. Jac. p. 63; *S. C. nom. Fairchild v. Gaire*, Yelv. p. 60.

(*m*) Whether a church is donative or not, is merely temporal, and a prohibition to a suit in the ecclesiastical court for pulling down the church was made absolute; but the plaintiff was ordered to declare.

Deschamp and Lee v. Dr. Andrews, Serj. Hill's MSS.

(*n*) See 1 Stillingfleet, Eccl. Cas. p. 70.

(*o*) 13 & 14 Vict. c. 76.

(*p*) Wats. c. 15, p. 170; 2 Roll. Abr. p. 341; Co. Litt. p. 344; *Farchild v. Gayre*, Cro. Jac. p. 63; *Quarles v. Fayrechild*, Cro. Eliz. p. 653.

from donatives properly so called, which are given and fully possessed by the sole donation of the patron in writing; inasmuch as collations and royal grants are to be followed by induction and instalment; and persons nominated to curacies are to be authorized by a licence from the bishop, before they can legally officiate. Whereas possession by donation is not subject to any of these consequents, but receives its full essence and effect from the single act and sole authority of the donor as aforesaid (q).

The form of a donation may be thus:—

Form of
donation.

“To all to whom these presents shall come. Know ye, that I, A. B. of — in the county of — Esquire, have given and granted, and by these presents do give and grant, to my beloved in Christ, C. D., clerk, the office or place of curate [or as the case shall be] of the chapel of — in the county of — now lawfully vacant, and to my donation and free disposition in full right belonging, and by these presents do make, constitute and appoint him the said C. D. curate of the said chapel, to have, hold, and enjoy the said office or place of curate in the chapel aforesaid, to him the said C. D. during his natural life, with all and every the salaries, stipends, rights and appurtenances to the same office or place of curate aforesaid in any wise belonging or appertaining, as fully, freely, and perfectly, and in as ample manner and form, as any other hath or ought to have held and enjoyed the same. In witness whereof I have hereunto set my hand and seal, the — day of — in the year of our Lord —” (r).

Or thus:—

“To all to whom these presents shall come, A. B. of — in the county of — Esquire, lord of the manor of — in the county of — sendeth greeting: Whereas the chapel of — in the county aforesaid is now vacant, and to my donation in full right belongeth; know ye, that I, the aforesaid A. B., have given and granted to my beloved in Christ, C. D. clerk, the aforesaid chapel of — with all its rights and appurtenances, and by the tenor of these presents do induct him the said C. D. into corporal possession of the said chapel, with all its appurtenances. In witness whereof, &c.” (s).

Effect of
donation.

The grant of a donative being once made, creates a right as full and lasting as institution and induction; that is, a right not to be taken away but by the registration or deprivation of the donee. The resignation was made to the donor; and the deprivation under the old law was made by the donor likewise; both the church and the clerk being exempt from ordinary jurisdiction. To this purpose it is, what we find in the reports of Sir John Davis, that a donative cannot be granted for years

(q) Wats. c. 15, p. 171.
(r) See Ecton, p. 617.

(s) Ibid. p. 618.

or at will only, because this great inconvenience would follow, that the freehold might be in perpetual abeyance; which is an inconvenience that the law will not suffer (t).

Although a clerk upon whom a donative is bestowed does not gain possession by presentation, institution, and induction, yet he is obliged, in order to preserve and maintain his possession, to be qualified and to qualify himself in many things, as others do who are presented, instituted, and inducted; as, How far the donee must qualify, as other clerks promoted.

(1) He must be a priest; without which, by 14 Car. 2, c. 4, s. 10, no person shall be admitted to any ecclesiastical promotion.

(2) He must, under the law till quite recently, have taken the oath of allegiance and supremacy before he takes the donation; and this he must have done before such person who has authority to admit him thereunto, that is, his patron, by 1 Eliz. c. 1, s. 10. But this it seems he need not now do (u).

(3) He must also, under the old law, before his admission to be incumbent or have possession of his donative, have subscribed before the archbishop, bishop, or ordinary of the diocese (or their vicar general, chancellor, or commissary respectively), the declaration of conformity to the liturgy of the Church of England as by law established. And if the donative had a parish church belonging to it, he must have had a certificate under the hand and seal of the person before whom he subscribed, to be read by him in such church afterwards (x).

This statute, however, has now been repealed; and it appears that donatives are not comprehended under the new act of 28 & 29 Vict. c. 122.

(4) And he ought, under the old law, to read the morning and evening prayers in his church or chapel within two months after he shall be in the actual possession of his donative, or in case of impediment (to be allowed of by the ordinary), then within one month after such impediment removed; together with the form of giving assent and consent thereunto. But this, again, has been repealed.

In the case of *Powel v. Milbank* (y), where the plaintiff claimed as having been appointed to the donative of Chester-le-Street, in the county and diocese of Durham, with cure of souls; two questions were made: first, whether an incumbent of a donative with cure is obliged to conform to the statutes of Elizabeth and Charles II.; and secondly, whether in that action it was necessary for him to give evidence that he had performed the several requisites contained in these statutes. As the court gave their opinion on the second question, that he was not obliged to give such evidence, unless some proof had been made by the defen-

Powel v. Milbank.

(t) *Gibs. p. 819. Case of the Dean and Chapter of Fernes, Davis,* p. 46.

(u) See p. 249, n. (y), *supra*.

(x) 14 Car. 2, c. 4; see 15 Car. 2, c. 6, s. 5.

(y) 2 Black. W. p. 851; *S.C. nom. Powell v. Milburn*, 3 Wils. p. 355. See also 1 T. R. p. 399 (n.).

dant to raise a doubt whether he had subscribed or not, they did not give a judicial determination upon the former point, but strongly inclined that donatives, with cure of souls, were within all the reasons, religious as well as political, upon which the acts of uniformity are founded, and seemed to think that this had been settled long ago, in the case of *Carver v. Pinkney*, M. 34 Car. 2, as reported in 3 Lev. 82.

Donative
within the
statutes of
simony and
plurality.
Lapse.

Donatives are within the statute against simony (z).

And where they have cure of souls, they are likewise within the law against pluralities (a).

If the patron of a donative do not nominate a clerk, there can be no lapse thereof, unless it be so specially provided for in the foundation; but the bishop may compel him to do it by spiritual censures (b).

But if it is augmented by Queen Anne's bounty, it will lapse in like manner as presentative livings (c).

How far
exempt from
the ordinary's
jurisdiction.

Lord Coke says, if the king doth found a church, hospital or free chapel donative, he may exempt the same from ordinary jurisdiction, and his chancellor shall visit the same. Yea, if he do found the same without any special exemption, the ordinary is not, but the king's chancellor, to visit it. And as the king may create donatives exempt from the visitation of the ordinary, so he may by his charter license any subject to found such a church or chapel, and to ordain that it shall be donative and not presentative, and to be visited by the founder and not by the ordinary. And thus began donatives in England (he says), whereof common persons were patrons (d).

But the register supposes a royal foundation, and not a mere royal licence; and that it must be proved to be ancient too, and therefore a new licence will not come up to the register (e).

However, it is certain that the ordinary could not under the old law visit a donative, but the patron must visit the same, by commissioners to be appointed by him (f).

And by consequence a donative was freed from procurations (g). And the incumbent was exempted (Dr. Gibson says) from attendance at visitations (h).

And it was said that if the bishop shall take upon him to visit a donative, and deprive the incumbent, he runs himself into the danger of a *premunire* (i).

And in such case was Barlow, bishop of Bath, in the time of King Edward VI., and was forced to get a pardon, for having deprived the dean of Wells, which was a donative by letters-patent from the king (k).

(z) Degge, pt. 1, c. 13. Said to be so resolved in *Carver v. Pinkney*, 3 Lev. p. 82. Vide infra, Part IV., Chap. III., sect. 3.

(a) Degge, pt. 1, c. 13. Vide infra, Part IV., Chap. III., sect. 6.

(b) 1 Inst. p. 344; Gibs. p. 819; *Fairchild v. Gaire*, Yelv. p. 61.

(c) Vide infra, p. 257.

(d) 1 Inst. p. 344.

(e) 1 Stillingfleet Eccl. Cas. p. 335; A Discourse Concerning Bonds of Resignation, p. 68.

(f) 1 Inst. p. 344.

(g) Degge, pt. 1, c. 13.

(h) Gibs. p. 819.

(i) Degge, pt. 1, c. 13.

(k) 3 Inst. p. 121.

But the ordinary had always power as to the parson, if he commits any misdemeanor, to proceed against him by spiritual censures, as in the case of *Colefatt v. Newcomb*; where a minister of a donative was sued in the ecclesiastical court, for that when he read prayers, he did not read the whole service, but left out what part of it he thought fit; and for preaching without licence. And it was moved for a prohibition, upon the suggestion that the church was a donative, and argued that donatives were exempt from the jurisdiction of the ordinary, and that it was a lay thing, and the bishop could not visit it; and that if the incumbent was guilty of heresy the ordinary could not meddle with him, for the parson was privileged in respect to the place; but the patron might by commission examine the matter, and upon cause deprive him. But Powell, J., in the absence of Holt, C. J., took the difference where the suit in the ecclesiastical court is in order to deprivation, and where only for reformation of manners: in the former case the court will prohibit, but not in the latter; and therefore if in this case the spiritual court proceeded to deprivation, the court would prohibit them, but not till then. He said he had known prohibitions denied frequently to suits against parsons of donatives for marrying without licence. And the reporter says, Mr. Mead and Mr. Salkeld both told him that they had known the Chief Justice Holt take the same distinction; that the parson of a donative was liable to the ecclesiastical jurisdiction, as he was a member of the ecclesiastical body, for personal offences, though for matters relating to the church he was exempt; and therefore the spiritual court could not deprive him; but for drunkenness, or preaching heresy, they might censure him. And this (says the reporter) seems to be the better opinion (1).

*Colefatt v.
Newcomb.*

So in the case of churchwardens. On a libel in the ecclesiastical court for not taking upon him the office of chapel-warden, the defendant pleaded that it was a donative, and thereupon moved for a prohibition. And upon debate, the same was denied; the whole court being of opinion, that though there was a difference as to the incumbent, yet as to the parish officers there was none, for they are the officers of the parish, and not of the patron of the donative (m).

Church-wardens in case of donative under general law.

And as to donatives augmented by the governors of Queen Anne's bounty, it is enacted by sect. 4 of 1 Geo. 1, st. 2, c. 10, as has been already stated (n), that all such churches, curacies or chapels, which shall be augmented by the governors of the said bounty, shall be from thenceforth perpetual cures and benefices, and the ministers duly nominated and licensed thereunto shall be in law bodies politic and corporate and have perpetual succession, and be capable to take in perpetuity; and the impropiators or patrons of any augmented churches or donatives, shall be

Donatives augmented by Queen Anne's bounty.

(1) 2 *Ld. Raym.* p. 1205.

(m) *Castle v. Richardson*, 2 *Str.*

p. 715; 1 *Barn. K. B.* p. 5.

(n) *Vide supra*, p. 242.

excluded from receiving any profit by such augmentation, and shall pay to the ministers officiating such annual and other pensions and salaries, which by ancient custom or otherwise, of right and not of bounty, they were before obliged to pay.

By sect. 6, for continuing the succession in such augmented cures, hereby made perpetual cures and benefices, and that the same may be duly and constantly served, it is provided that if they shall be suffered to remain void for six months, they shall lapse in like manner as presentative livings.

By sect. 14, all such donatives which at the time of their augmentation are exempt from all ecclesiastical jurisdiction, shall by such augmentation become subject to the visitation and jurisdiction of the bishop of the diocese wherein such donative is.

But by sect. 15, no donative shall be augmented without the consent of the patron in writing under his hand and seal.

Next donation goes to the heir and not to the executor.

In the case of *Repington v. The Governors of Tamworth School*, a person being seised of the advowson of a donative, the church in his lifetime becomes void; then he dies, the church being still void. By his will he made the plaintiff executor, who brought a *quare impedit*, supposing himself entitled to this turn, as an executor is in the case of a presentative benefice. After two arguments in the Court of Common Pleas, the whole court was clearly of opinion, that the right of donation descended to the heir-at-law; and that the executor had not a title, which he would have had, if it had been a presentative benefice (o).

How patron may appoint himself.

In *Lowce v. Bishop of Chester* (p), it was decided that the patron of a donative might transfer the right of donation while the benefice was vacant to a trustee for himself, in order that such trustee might appoint him to the donative, and that such appointment was good. It is suggested that this decision may require reconsideration.

How far of temporal cognizance.

It was said in *Sprat and Nicholson's case* (q), that if issue be joined, whether donative or presentative, it shall be tried by a jury at the common law; and elsewhere it is said, that if the patron of a donative being disturbed in collating, recover by *quare impedit*, the writ shall be directed to the sheriff, to put the clerk in possession (r).

For if the patron of a donative is disturbed in collating his clerk, he may have a *quare impedit* against the bishop and the disturber; but the declaration in such a case must be special (s).

It was once holden that a mandamus would lie, to admit or restore the donee (t). But a mandamus is not now granted in

(o) 2 Wils. p. 150.

(p) 10 Q. B. D. p. 407; vide *infra*, pp. 271, 311.

(q) God. p. 196.

(r) Gibs. p. 820; 14 Hen. 4,

p. 11 b, cited in *Powel v. Milburn*, 3 Wils. p. 355.

(s) Degge, pt. 1, c. 13.

(t) *Res v. Bloer*, 2 Burr. p. 1043.

Vide *supra*, p. 246.

that case, the party having a specific remedy by *quare impedit*. And such an application will be dismissed with costs (u).

Lord Coke says, if the patron of a donative does once present to the ordinary, and his clerk is admitted and instituted, it is now become presentable, and never shall be a donative after. But a presentation to such a donative by a stranger, and admission and institution thereupon, is merely void (x).

Is not extinguished by presentation.

But in the case of *Ladd v. Widdows*, upon motion for a new trial in a *quare impedit*, wherein the point in issue was, whether the church was donative or presentative, evidence was pleaded of several presentations; and the court, viz., Holt, C. J., and Powell, J., held, that though a presentation might destroy an impropriation, yet it could not destroy a donative; because the creation thereof was by letters-patent, whereby land is settled to the parson and his successors, and he to come in by donation (y).

In *Reg. v. Foley*, upon the construction of a private act of parliament, it was held that a donative was not created (z).

Reg. v. Foley.

Donatives are expressly defined to be included under the term benefice in the following statutes: 1 & 2 Vict. c. 106, by s. 124; 3 & 4 Vict. c. 86, by s. 2; 13 & 14 Vict. c. 98, by s. 3; 34 & 35 Vict. c. 43, by s. 3; c. 44, by s. 2; c. 45, by s. 1.

Included under benefices.

By sect. 10 of 6 & 7 Will. 4, c. 77, the Ecclesiastical Commissioners are empowered to prepare schemes to be laid before the Queen in Council for carrying into effect the changes proposed by that act. The section proceeds: "That it shall be competent to the said commissioners to propose in any such scheme that all parishes, churches, or chapelries which are locally situate in any diocese, but subject to any peculiar jurisdiction other than the jurisdiction of the bishop of the diocese in which the same are locally situate, shall be only subject to the jurisdiction of the bishop of the diocese within which such parishes, churches, or chapelries are locally situate."

Made subject to bishops by modern acts.

By sect. 1 of 10 & 11 Vict. c. 98, "the bishop of every diocese in England shall by himself or his officers exercise throughout the whole of his diocese, as it now is or hereafter may be limited or constituted . . . the same jurisdiction and authority which before the passing of this act he or any bishop lawfully could or might exercise by himself or his officers within any part of such diocese."

It seems therefore that so long as this last mentioned act is annually continued in force, as is the case at present, all donatives comprised within the territorial limits subjected by any scheme of the Ecclesiastical Commissioners to the bishop of any diocese are subject to that bishop, and the donees thereof visitable and compellable to attend visitations.

(u) *The King v. Bp. of Chester*, 1 T. R. p. 396. p. 63.

(y) 2 Salk. p. 541.

(x) 1 Inst. p. 344; F. N. B. p. 35; *Farchild v. Gayre*, Cro. Jac. s. 273.

(z) 2 C. B. p. 664; vide infra,

CHAPTER XI.

ENTRY ON BENEFICE.

- SECT. 1.—*Advowsons.*
 2.—*Exchange of Advowsons.*
 3.—*Presentations—Who may present.*
 4.—*Circumstances attending Presentations.*
 5.—*Examination by the Ordinary.*
 6.—*Remedies of Clerks.*
 7.—*Remedies of Patrons.*
 8.—*Admission, Institution, and Induction.*
 9.—*Lapse.*

How a clerk is put in possession of a benefice.

It is now proposed to consider the law which regulates the admission of a clerk to a benefice.

The first step, whatever legal terms be employed, must always be the presentation of the clerk to the ordinary for institution into the benefice. The question immediately arises, who has a right to present, or, as it is technically called in our law, the right of advowson?



SECT. 1.—*Advowsons.*

We will first consider—

1. The general character and nature of an advowson.
2. How it is acquired, how grantable, and how lost.

Foundation of the right of advowson.

It is very uncertain whether, during the time of the Apostles and the period which immediately succeeded to their administration, any certain rules regulated the distribution of the revenues of the church (*a*). It appears that, in the very early ages of Christianity, the oblations made in the diocese were usually deposited with the bishop, who was accountable for his disposal of them to the provincial synod (*b*). In the western churches they were usually divided into three or four parts; one was set apart for the bishop, a second for the rest of the clergy,

(*a*) Lindwood, *Provinciale*—*Bingham, Origines Ecclesiasticæ*—*Van Espen, Jus Ecclesiasticum Universum*, tit. *Jus Patronatûs*—*Godolphin Repertorium Canonicum*—*Thomassini vetus et nova Eccle-*

siæ Disciplina, vol. 2, cc. 20, 21, 22—are the authorities from which the following observations have been for the most part deduced.

(*b*) *Canones Concilii Antiochenis*, c. 25; *Canones Apostolicæ*, c. 41.

a third for the poor, a fourth for the maintenance of the fabric and the necessary uses of the church. Where only three divisions (*c*) were made, it was presumed that the hospitality of the bishop would provide for the necessities of the poor. There was an exception, indeed, to this generally prevalent custom; in some churches no division was made; the clergy and bishop lived together in one mansion, and at one table, without any distinction of property or revenue. Such cases were rare, and not in obedience to any general law, but to local and particular statutes of their own enactment (*d*).

The great church of the diocese provided in one of these two ways for the maintenance of its clergy until parochial churches were built and endowed. And apparently coeval with this institution of parochial divisions was the "*jus patronatûs*" of the canonists (*e*), or the right of advowson of the English common law. For, in order to promote the building and endowment of parochial churches, those who had contributed to their erection either by a grant of land, by building, or by endowing, were entitled to present a clerk of their own choice to the bishop, who was invested with the revenues accruing from such contribution. "*Patronum faciunt dos, edificatio, fundus.*"—"*Si quis ecclesiam cum assensu diocessani construxit, ex eo jus patronatûs acquirit*" (*f*). The clerk so presented must have been a person capable of performing the functions of his office; but, subject to this exception, his admission was imperative upon the bishop. The earliest trace of this practice seems to be found in the decree of the Council of Orange, A.D. 441, which granted this privilege to bishops; allowing a bishop, who built a church in the diocese of another bishop, to nominate the clerk, though not to consecrate the church. "Advowson" (says the learned Godolphin) "is a kind of bastard French word, sometimes called '*advocatio ecclesiæ*,' either because the patron thereof claiming his '*jus patronatûs*' therein '*advocat se*' in his own right unto the same, '*eamque esse sui quasi clientis loco*'; or rather because the patron in his own right '*advocat alium*' to the church being vacant, and presents him unto it '*loco alterius, veluti defuncti.*'" According to his definition of advowson, it is "a kind of reversionary right of presentation to an ecclesiastical benefice in a man and his heirs for ever" (*g*). This right of advowsons, or *jus patronatûs*, the law doth also distinguish into ecclesiastical and laical. Touching the ecclesiastical (*h*), it is so called not because an ecclesiastic may or doth enjoy or possess it (for so

Early instances.

Derivation of advowson.

Ecclesiastical and laic.

(*c*) Cf. *Canones Concilii Bracara*, c. 7.

(*d*) *Augustini Opera Omnia*, vol. v. pp. 2046—2061, *Sermones, De vita et moribus clericorum suorum*.

(*e*) The "*jus patronatûs*" of the civil law referred to the relation

between the lord or patron and the bondsman he had set free.

(*f*) X. 3, 38, cc. 4, 24, 25.

(*g*) *God.* p. 205. See *Black. Com.* vol. ii. p. 21.

(*h*) *Covarruvias*, p. 383; *Gaill Practicæ observationes*, Lib. i. c. 36.

he may also possess a laic patronage), but because it belongs to one, for that he has founded, built, or endowed the church *ex bonis ecclesiasticis*, or by reason of some rectory of a church, or some ecclesiastical dignity. As when a benefice is erected with money gotten *ex bonis ecclesiasticis*, in that case he has *jus patronatus ecclesiastici* or *patronatum ecclesiasticum*. And so it is if one has the advowson or right of presentation because he is a bishop, or dean, or the like; this is also *Jus Patronatus Ecclesiastici*. So the Gloss. in Clem. ii. *de jure patronatus, etc (i)*. The 123rd Novell of Justinian, promulgated about the end of the fifth century, decreed "that if any man should erect an oratory, and desire to present a clerk thereunto by himself or his heirs, if they furnish a competency for his livelihood, and nominate to the bishop such as are worthy, they may be ordained." The 57th Novell, c. 2, empowers the bishop to examine them and judge of their qualifications, and, where there are sufficient, obliges him to admit the clerk. About the same time, it would seem that other revenues, such as oblations and tithes, became appropriated to the parochial church. But Bede (*j*) intimates that the English clergy continued to receive maintenance from the cathedral church, and to officiate only *pro tempore* in the parochial churches, till about the year 900.

Advowsons in
other founda-
tions than
parish
churches.

It is observed also by Godolphin, that advowson, being a right of presentation reserved by a founder to himself, his heirs and his successors, is applicable to other ecclesiastical foundations, as well as those of parochial churches. And the truth of this remark is evidenced by several instances, where a "*quare impedit*" has been brought on such occasions as a disturbance to a prebend, 7 Rich. 2; in a presentation to a vicarage, 5 Edw. 3; to a provostry, 17 Edw. 3, 20; to a chaplaincy, 17 Edw. 3, 12. The 17th canon of the council of Lateran, in the year 1179, enacts, "that if a question arise concerning presentations of divers persons to one church, or concerning the gift of patronage, if such question be not decided within the space of three months, the bishop shall place in the church the person whom he himself conceives to be most worthy" (*k*).

Status of
patron.

Lastly, the canon law characterized the "*jus patronatus*" by the epithets "*honorificum*," "*utile*," "*onerosum*." "*Honorificum*," because the patron was entitled to great respect from the parish, and especially to the chief seat in the church; "*onerosum*," because it was incumbent on him to defend his church against all spoliation of her revenues (*l*), and to secure her fabric and all its appurtenances against dilapidations; "*utile*," because if

(i) God. Introd. p. 34.

(j) Hist. Lib. iv. c. 27.

(k) Canones Concilii Lateranensis, III. c. 17.

(l) See *Hoskins v. Featherstone*, 2 Brown, C. C. p. 552, for the power of the patron where the benefice is vacant and there is no one to protect the rights of the church.

he or his family fell into decay, the church was pre-eminently bound to supply his necessities before those of any other necessitous person (*m*).

The right of advowson is said by Mr. Justice Blackstone in his Commentaries, to be an instance of an incorporeal hereditament, of which no bodily possession can be had, but which exists solely in contemplation of law (*n*). Advowsons are of two sorts, appendant and in gross. When annexed to a manor or land, so as to pass with them, they are said to be appendant: when they exist as personal rights, independent of any manor or land, they are said to be in gross (*o*). Another division is, that they are either presentative, collative, donative, or elective (*p*). In an advowson presentative, the patron presents the person to the ordinary to be instituted and inducted in his church: in an advowson collative, the bishop is both patron and ordinary: in a donative, the patron puts the clerk in possession without any presentation to the ordinary. Elective benefices occur in cathedral and other corporations.

Classes of
advowsons.

The right of nominating, which at first was annexed to the person building or endowing the church, became by degrees appendant to the manor in which it was built. For the endowment was supposed to be parcel of the manor, and the church was built by such lord for the use of the inhabitants of this manor; and the tithes of the manor were also annexed to the church. Upon all which accounts it was most natural for the right of advowson (which was now become hereditary) to pass with the manor, or with such part of it as might at any time be granted or aliened together with the advowson: to which (whether to the whole or part) it is therefore said to be appendant: that is, to the demesnes, which are of perpetual subsistence, but not to rents or services, which (though parcel of the manor) may be extinguished, and cannot therefore support such appendancy (*q*). The advowson was said to be appendant to the manor, being so closely annexed to it that it passed as an incident thereto by a grant of the manor (*r*): it passed, therefore, by livery without deed, without saying, "*cum pertinentiis*" (*s*),

Advowson
appendant.

(*m*) See especially on this point, 16 Q. 7, 30. Patrons were called *advocati* and *patroni*, because they were bound to protect and defend the rights of the church, and their clerks, from oppression and violence. *Tueri et defendere ecclesiam et ejus jura tenetur ad instar advocati qui judicio causam alicujus defendit*. Lind. p. 97, n. (*p*) (but Lindwood in this Gloss says, that *advocatus* does not mean patron, but defender. See Calvin, Lexicon Juridicon v. "*Advocatus*," where he says the word is commonly, though not cor-

rectly, used as synonymous with *patronus*).

(*n*) Vol. ii. p. 21.

(*o*) See 1 Inst. p. 120 b, p. 122 a.

(*p*) Ibid. p. 119 b.

(*q*) Gibs. p. 757; Wats. c. 7, p. 60; 1 Inst. p. 122 a. See also Com. Dig. tit. Advowson; Tyrringham's case, 4 Co. p. 36; 1 Roll. Abr. p. 230; Potter v. North, 1 Vent. p. 386; Hill v. Grange, Plow. p. 170.

(*r*) Cruise, Dig. tit. Advowson, vol. iii. p. 3.

(*s*) 1 Inst. p. 121; 2 Ibid. p. 307.

except in the case of the king (*t*). A church in one county may be appendant to a manor in another, or the advowson of a vicarage may be and is of common right appendant to a rectory, or to a manor by prescription; and it shall be intended it was granted by the parson before the time of memory. Advowsons may also be appendant for a part or for turn. Two advowsons may be appendant to one manor, or one advowson to two manors; and several advowsons may be appendant to the same manor, though the manor extends into several parishes (*u*). An advowson will not pass by the word "land," but it will by "hereditaments" (*x*), or by the word "church" (*y*). It is said that an advowson might have been appendant to an earldom or other honour; but this must be understood of such as had demesnes attached to them, for being itself an incorporeal hereditament, it can only be appendant to a corporeal thing (*z*): and therefore it is that a presentation to a church is allowed to be equivalent to a corporeal seisin of the land; but till the church becomes void, it is impossible to acquire anything more than a seisin in law of an advowson (*a*). But a demise of a manor *cum pertinentiis* for years will not pass an advowson to a lessee, because a spiritual benefice cannot be granted for years or at will (*b*). The grant of a manor, with all advowsons, &c., thereunto attached, does not include an advowson once severed, though it was appendant to the manor 800 years since (*c*).

If he that is seised of a manor, to which an advowson is appendant, grants one or two acres of the manor, together with the advowson; the advowson is appendant to such acres, especially after the grantee has presented (*d*). But this feoffment of the acre with the advowson ought to be by deed, to make the advowson appendant; and the acre of land and the advowson ought to be granted by the same clause in the deed; for if one, having a manor with an advowson appendant, grant an acre parcel of the said manor, and by another clause in the same deed grants the advowson, the advowson in such case shall not pass as appendant to the acre; but if the grant had been of the entire manor, the advowson would pass as appen-

(*t*) *Liford's case*, 11 Co. p. 47; *Case of Bedminster Manor*, 3 Dyer, p. 300.

(*u*) See Mirehouse on Advowsons, c. 1, citing 3 Dyer, p. 350; Roll. Abr. p. 230; Com. Dig. tit. Advowson; Degge, pt. 1, c. 13, p. 195; *The Grocers' Company v. The Abp. of Canterbury*, 2 Black. W. p. 771.

(*x*) *Savil v. Savil*, Fortescue, p. 351. See *Robinson v. Tonge*, 3 P. Wms. p. 401; *Kinaston v. Clark*, 2 Atk. p. 206.

(*y*) *Ashegell and Dennis' case*, 1

Leon. p. 191; 1 Inst. p. 17; *Colt v. Bp. of Coventry and Lichfield*, *Anon.*, Cro. Eliz. p. 163; Hob. p. 152.

(*z*) 1 Inst. p. 121; *Tyrringham's case*, 4 Co. p. 37; 1 Roll. Abr. p. 230; *Potter v. North*, 1 Vent. p. 366; *Hill v. Grange*, Plow. p. 170.

(*a*) 3 Cruise, Dig. vol. iii. p. 6.

(*b*) Com. Dig. tit. Advowson (C. 1).

(*c*) *King v. Bp. of Durham*, 1 Com. p. 360.

(*d*) Wats. c. 7, p. 62.

dant (*e*). So, if an husband seised in right of his wife of a manor to which an advowson is appendant, alien the manor by acres to divers persons, saving one acre, the advowson shall be appendant to that acre. Or if a lessee for life of a manor, to which an advowson belongs, alien one acre, with the advowson appendant, the advowson is thereby appendant to that acre (*f*).

An advowson of a vicarage may be appendant to a parsonage, as being derived and endowed out of the same. Upon which account it is, that if a parson be patron of a vicarage and lease the parsonage to another, the patronage of the vicarage shall pass as incident thereunto. And upon the same account the rector of common right is ever esteemed patron of the vicarage, though by some ordinance or composition, or by the king's grant, it may be appointed and settled otherwise. And so may even an advowson of a vicarage be appendant unto other things, as to a manor, by reservation upon the appropriation, because the advowson of a rectory was appendant thereunto, as also by the grant of the parson, before the time of memory. And in this case, although the act of appropriation be not extant, yet the use of presenting time out of mind is a sufficient evidence of the appendancy to the manor, contrary to the common right (*g*).

The right of advowson, though appendant to a manor, castle, or the like, may be severed from it; and being severed, it becomes an advowson in gross, and may belong to a person possessing no corporeal estate. And this may be effected in divers ways: As, 1. If a manor or other thing to which it is appendant is granted, and the advowson excepted (*h*). 2. If the advowson is granted alone, without the thing to which it was appendant (*i*). 3. If an advowson appendant is presented to by the patron, as an advowson in gross (*j*).

A disappendency may be also temporary; that is, the appendancy, though turned into gross, may return: As, 1. If the advowson is excepted in a lease of a manor for life; during the lease it is in gross, but when the lease expires, it is appendant again (*k*): 2. If the advowson is granted for life, and another infeoffed of the manor with the appurtenances; in such case the reversion of the advowson passes, and at the expiration of the grant it shall be appendant (*l*): 3. If the advowson is allotted to one coparcener, and the manor to another, and she who had the advowson dies without issue, it is appendant again: and so if

Advowson
of vicarage
appendant.

Advowson in
gross.

Advowson
temporarily
appendant.

(*e*) 1 Dyer, p. 48, p. 2.

(*f*) Wats. c. 7, p. 61.

(*g*) Ibid.; *Shirley v. Underhill*, Mo. p. 894; 3 Dyer, p. 350 b; vide supra, p. 225.

(*h*) Cf. Wats. c. 7, p. 62; Dyer, p. 48; *Fulmerston v. Steward*, Plow. p. 103; Perkins' Profitable Book, Ch. 1, s. 104, p. 22.

(*i*) Cf. Dodderidge's Compleat Parson, Lecture 10, p. 55; *Ives'*

case, 5 Co. p. 11; Plow. p. 103; *Liford's case*, 11 Co. p. 50.

(*j*) Gibbs, p. 757.

(*k*) 3 Cruise, Digest, p. 4; *Ives' case*, 5 Co. 11 b; Wats. c. 7, p. 63.

(*l*) *Hartop v. Dalby*, Het. p. 14; *S. C. nomine Hartopp v. Cock*, Hutt. p. 88. See, however, *Stukeley v. Butler*, Hob. p. 168; also *Elwes v. Abp. of York*, Hob. p. 323; cited in *Rex v. Bp. of Chester*, Ld. Raym. p. 302.

the demesnes are allotted to the one and the services to the other, the advowson becomes in gross; but if the one die without issue, and the manor descend to her who had the services, the advowson becomes appendant, as it was before (*m*): 4. If tenant in tail aliens some part of the manor with the advowson, and the alienee grants the advowson to a stranger; or, if a common person has an advowson appendant, and a stranger presents his clerk, who is in by six months; in both these cases the advowson is made disappendant; but yet, if in the first case the land aliened is recovered by the tenant in tail, and in the second case the rightful patron recovers, the appendancy returns (*n*); but the statute 7 Anne, c. 18, provides that no usurpation shall displace the estate of the patron (*o*): 5. Where an advowson is appendant to a manor, and the owner mortgages the manor in fee, excepting the advowson, by this means it is become in gross; but if the money be paid punctually at the day, then it is become appendant again, and if it is paid after the day, it is appendant in reputation, and may pass by the name of an advowson appendant, in a grant or other conveyance, though in reality the appendancy is destroyed; for if it is severed one instant from the manor by the act of the party, it is then in gross and not appendant (*p*): 6. So where the owner of a manor to which an advowson was appendant accepts a fine of the advowson, with a grant and render back of every second turn; now, for such turn the advowson is in gross, but for other turns the appendancy still continues; but if a man levy a fine of the advowson, and accepts a grant and render, the appendancy is quite gone, because there was an instant of time in which it became severed (*q*): 7. So where there are two coparceners of a manor to which an advowson is appendant, and they make partition of the manor, without taking notice of the advowson; at every other turn it is still appendant: but if there had been any express exception of the advowson, it would then be in gross (*r*): 8. If two joint tenants are seised of a manor to which an advowson is appendant, and the one releases all his right of advowson to the other in fee, this advowson is both in gross and appendant: 9. If one advowson appendant and one in gross be united, the advowson will be appendant for one turn, and united for the other (*s*): 10. If three are seised of a manor with an advowson appendant, and two of them release

(*m*) *Rex v. Bp. of Chester*, 3 Salk. pp. 25, 40; *Sir M. Finch's case*, 6 Co. p. 64; 1 Ld. Raym. p. 193.

(*n*) 1 Inst. p. 333 b; *Colt v. Bp. of Coventry and Lichfield*, Hob. p. 140.

(*o*) See *Boteler v. Allingham*, 3 Atk. p. 455.

(*p*) *Rex v. Bp. of Chester*, 3 Salk. pp. 25, 40; 1 Ld. Raym. p. 292;

Skin. p. 651.

(*q*) *Ibid.*; *Dyer*, pp. 78 b, 259 a; 3 Cruise, Digest, p. 6.

(*r*) *Gibs*. p. 757; *Rex v. Bp. of Chester*, 3 Salk. p. 25; 1 Inst. p. 122 a; 3 Cruise, Digest, p. 5.

(*s*) *Marsh and Smith's case*, 1 Leon. p. 26; *Dyer*, p. 259 b; *Com. Dig. tit. Advowson*, p. 6.

all their rights of advowson to a third, the third is seised of two parts of the advowson as gross, and of the third part as appendant; but if the third dies, the entire advowson descends in gross to the heir, for nothing was in jointure but the manor that survived to the other two (*t*).

But in the case of the king, by the statute of *Prerogativa Regis*, or 17 Edw. 2, c. 17, "When the king giveth or granteth land or a manor with the appurtenances, without he make express mention in his deed or writing of . . . advowsons of churches . . . when they fall, belonging to such manor or land, at this day the king reserveth to himself such . . . advowsons . . . albeit that among other persons it hath been observed otherwise" (*u*).

Construction
of royal
grants.

Giveth or granteth.]—But when he restoreth, as in case of the restitution of a bishop's temporalities; then advowsons pass without express mention, or any words equivalent thereto (*x*).

Without he make express Mention.]—Either by name, or with the appurtenances, or as fully and perfectly, or in as ample manner and form, or the like, which have been adjudged equivalent to an express mention, because the grantee may inquire what the appurtenances were, and in what manner and form it was held; and forasmuch as the uncertainty may be reduced to a certainty, by inquiry or circumstance, the grant is good (*y*).

Other Persons.]—The law in the case of a common person is thus set down by Rolle, out of the ancient books: If a man, seised of a manor to which an advowson is appendant, aliens that manor, without saying with the appurtenances (and much more without naming the advowson), yet the advowson shall pass, for it is parcel of the manor (*z*).

Grants by
private
persons.

An advowson in gross is understood as a much more beneficial qualification than that which is appendant; and therefore in the case where a man, being seised of a manor whereunto an advowson was appendant, and by deed granting one acre *una cum advocacione ecclesie*, did further by the same deed give and grant the said advowson, the question was, whether the advowson did pass as an appendant to the acre, or as an advowson in gross; it was decided to pass as in gross, as being most beneficial for the grantee (*a*).

Advowson in
gross better
than ap-
pendant.

There is an usual difference taken between "*advocatio medietatis*" Advowson of

(*t*) Dodderidge, sect. 11, p. 60; Mirehouse, p. 20; see, too, 33 Hen. 6, pp. 4, 8.

(*u*) See *Ashegell and Dennis' case*, 1 Leon. p. 191; *John London v. The Chapter of Southwell*, Hob. p. 304; *Rex v. Bp. of Norwich*, 1 Roll. p. 237; *Anon.*, Cro. Eliz. p. 163; *Vice-Chancellor of Cambridge v. Walgrave*, Hob. p. 106; *The Queen and Lord Lumley's case*, 2 Leon. p. 80; *Sir John Molyns' case*, 6 Co.

p. 6; *Case of the Churchwardens of Southwark*, 10 Co. p. 67; *Rex v. Bp. of Rochester*, 2 Mod. p. 1; *Reg. v. Hussey*, Cro. Eliz. p. 819. The statute does not apply to a lay advowson. *Att.-Gen. v. Ewelme Hospital*, 17 Beav. p. 366.

(*x*) *Thistler's case*, 10 Co. p. 64.

(*y*) *Id.*

(*z*) 2 Rolle, Abr. p. 60.

(*a*) *Dyer*, p. 48; *Hughes*, Abr. v. Advowson; *God.* p. 218.

a moiety of a church.

ecclesia," and "*medietas advocacionis ecclesie*." The former is where two patrons be, and every of them having right to present a several incumbent to the bishop to be admitted into one and the same church (for divers may be several parsons and have cure of souls in one parish) (*b*), and such advowson is alike in either of these patrons, but every of their presentments is to the moiety of the same church, and therefore it is called "*advocatio medietatis ecclesie*," or, as the case may be, "*advocatio tertie partis ecclesie*," and the like. The latter, viz., *medietas advocacionis ecclesie*, is after partition between parceners; for although the advowson be entire amongst any of them, yet any of them being disturbed to present at his turn should have the writ of *medietate*, or of *tertia*, or of *quarta parte advocacionis ecclesie*, as the case is. And this difference was taken and observed only in the writ of right, which is altogether grounded upon the right of patronage. But in the *quare impedit*, which is only to recover damages, no such diversity is considered, but the writ is general "*presentare ad ecclesiam*" (*c*). A conveyance of a fourth part of an advowson in 1672 is not to be deemed voluntary because the only pecuniary consideration expressed in the deed is 20s.; the court will presume that 20s. would be the full value of a fourth part of an advowson at that time (*d*). A declaration stated that a deed conveyed the purparty of an advowson; by the deed the whole was conveyed; but it appeared that the person making the conveyance was possessed only of a purparty, and it was holden no variance (*e*).

Advowson only a trust.

The right or property which a patron has in an advowson will not warrant a plea (as it is in temporal property), that he is seised in his demesne as of fee, but only seised in fee. The reason of which is, because that inheritance, savouring not *de domo*, cannot either serve for sustentation of him and his household, nor can any thing be received for the same, for defraying of charges. And in the case of *John London v. The Chapter of Southwell*, where the words of the lease were, commodities, emoluments, profits and advantages, to the prebend belonging, it was adjudged that the advowson could not pass by the said words, because all of them implied things gainful, which (as was added) is contrary to the nature of an advowson regularly (*f*).

And hereby it appears how the common law detests simony, and all corrupt bargains for presentations to any benefice, but

(*b*) Vide supra, p. 237; infra, p. 415.

(*c*) Dodderidge, Lect. 4, pp. 22, 23; God. p. 206; cf. also as to the distinction between the right of nomination and that of presentation, *Shirley v. Underhill*, Mo. p. 894; 2 Roll. Abr. p. 342; Dal. p. 48; *Rex v. Marquis of Stafford*, 3 T. R. 646. As to where two

parsons are to be considered as one in the same church, 1 Inst. p. 18 a.

(*d*) *Gully v. Bp. of Exeter*, 5 Bing. p. 191; 2 M. & P. p. 266.

(*e*) 4 Bing. p. 290; 12 Mo. p. 591.

(*f*) 1 Inst. p. 17 b; Hob. p. 303. See, however, authorities apparently contradicting this position, in Mr. Hargreave's Notes on 1 Inst. p. 17.

that a fit person for the discharge of the cure should be presented freely without expectation of any thing. Nay, so curious is the common law in this point, that the plaintiff in a *quare impedit* could recover no damages for the loss of his presentation, until the statute of 13 Edw. 1, c. 5. And that is the reason that a guardian in socage shall not present to an advowson, because he can take nothing for it, and by consequence he cannot account for it; and by the law he can meddle with nothing that he cannot account for (*g*).

Which said doctrine and the plain tendency thereof are exactly agreeable, not only to the nature of advowsons, which are merely a trust vested in the hands of patrons by consent of the bishop, for the good of the church and religion, but also to the express letter of the canon law, the rule of which is, that the right of patronage, being annexed to the spirituality, cannot be bought or sold. *De jure vero patronatus . . . mandamus quatenus si R. illud comparavit, (cum inconveniens sit et penitus inhonestum vendi jus patronatus, quod est spirituali annexum,) contractum illum . . . irritum esse decernas* (*h*). "So that the notion and practice of making merchandise of advowsons and next avoidances is not easily reconciled, either to the laws of the church, or to the ancient laws of the land, or to the nature of advowsons, considered as trusts for the benefit of men's souls. Nor doth it follow either from the patron's being now vested with that right by the common law, or from its being annexed to a temporal inheritance, that it is itself a temporal inheritance, or ought (legally speaking) to be considered otherwise than as a spiritual trust; since it is certain that the foundation of the right was the consent of the bishop; and as to what is called appendancy, it amounteth to no more than this, that a trust of a spiritual nature and for spiritual ends shall rest in the same person to whom the temporal inheritance doth belong. For the separation of advowsons from the manors, and the grants of next avoidances and the like, were steps taken afterwards, and what undoubtedly were never thought of by the bishop upon the first concession, who had nothing in his eye but the encouragement of such pious foundations, and a reasonable respect to the founder (who was supposed to dwell there) in the nomination of such a clerk as might be acceptable to himself, under the restraint of being admitted or not admitted by the bishop" (*i*).

"The equity of which union of the advowson to the manor seems to be the foundation of that maxim of the canon law, *jus patronatus transit cum universitate nisi specialiter excipiat* (*k*), and of the common law, that the advowson passeth with the manor, of course, without any express words to convey it; for though it be otherwise in the case of the king, yet that is upon

(*g*) 1 Inst. p. 17 b.
(*h*) X. iii. 38, 16.

(*i*) Gibs. p. 758.
(*k*) X. iii. 38, 7, in Gloss.

the foot of the statute of *Prerogativa Regis*, and not of the common law" (l).

To the purpose of the remarks preceding it is material that the canon law expressly forbid the obtaining and procuring of next presentations; as we find in a decretal epistle of Pope Alexander the Third to the Bishop of Exeter; upon which the rule of the law is, *Qui emit jus patronatus ut possit presentare filium vel nepotem seu quem vult, eo privari debet* (m).

How grant-
able.

A person may be tenant in fee simple of an advowson as well as of a piece of land; in which case he and his heirs have a perpetual right of presentation (n): he may have such an estate in an advowson as he may in any other real possession, whether created by common law or by statute. It will be seen below that a trustee or mortgagee has not the right of nomination, but merely of presentation. A *cestui que trust* (o), or a purchaser before conveyance, may be equitable owner of an advowson (p). Whatever conveyance will transfer real incorporeal property will transfer an advowson in gross, and it has been already said that an advowson appendant passes as an incident with its principal.

An advowson in gross being an inheritance incorporeal, and not lying in manual occupation, cannot pass by livery of seisin (q), but may be granted by deed or by will, either for the inheritance, or for the right of one or more turns (r), or for as many as shall happen within a time limited (s). But this general rule with regard to advowsons in gross, next avoidances, and the like, is to be understood with two limitations:—

How far by
clerks seised
in right
of their
benefices.

That it extends not to ecclesiastical persons of any kind or degree, who are seised of advowsons in the right of their churches; nor to masters and fellows of colleges, nor to guardians of hospitals, who are seised in right of their houses: all these being restrained (the bishops by the 1 Eliz. c. 19, and the rest by the 13 Eliz. c. 10) from making any grants but of things corporeal, of which a rent or annual profit may be reserved; and of that sort, advowsons and next avoidances, which are incorporeal and lie in grant, cannot be. And therefore such grants, however confirmed, are void against the successor; though they have been adjudged to be good against the grantors (as bishop, dean, master or guardian) during their own times (t).

Where the right of granting is absolute and indisputable; yet

(l) *Gibs. p. 758. Vide supra, p. 267.*

(m) *X. iii. 38, c. 6.*

(n) *3 Cruise, Digest, p. 6.*

(o) *Ibid. p. 4.*

(p) *Boteler v. Allingham, 3 Atk. p. 455; Cleer v. Peacock, Cro. Eliz. p. 359; Gardiner v. Griffiths, 2 P. Wms. p. 404.*

(q) *1 Inst. pp. 332 a, 335 b; 2 Black. Com. p. 22, Mr. Christian's note.*

(r) *Throckmerton v. Tracey, Plow. p. 152; Crip's case, Cro. Eliz. p. 164; Elvis v. Abp. of York, Hob. p. 322; 1 Inst. p. 249.*

(s) That an advowson in gross cannot pass by verbal grant, see Mr. Christian's note to 2 Black. Com. p. 22.

(t) *Smalwood v. Bp. of Coventry, Cro. Eliz. p. 207; Armiger v. Bp. of Norwich, p. 690; Rennell v. Bp. of Lincoln, 7 B. & C. 174.*

a grant cannot be made by a common person whilst the church is void, so that the grantee be entitled thereby to such void turn. For however the avoidance that shall happen next after, or the inheritance of the advowson, may be granted when the church is void, the void turn itself (being a mere spiritual thing, and annexed to the person of the patron) is not grantable; it is then (as the law books speak) a thing in power and authority, a thing in action and effect; the execution of the advowson, and not the advowson. This is the doctrine and language of all the books, which also say, that if two have a grant of the next avoidance, and one releases all right and title to the other while the church is void, such release for the same reason is void. But all this is to be understood of common persons only and not of the king, whose grant of a void turn has been adjudged to be good (*u*).

As to the purchase of next presentations, a restriction has been placed upon clergymen, as to whom it is enacted by 13 Anne, c. 11, as follows:—"Whereas some of the clergy have procured preferments for themselves by buying ecclesiastical livings, and others have been thereby discouraged, be it further enacted . . . that if any person shall or do for any sum of money, reward, gift, profit, or advantage, directly or indirectly, or for or by reason of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly, in his own name, or in the name of any other person, take, procure, or accept the next avoidance of or presentation to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, and shall be presented or collated thereupon, that then every such presentation or collation, and every admission, institution, investiture, and induction upon the same, shall be utterly void, frustrate, and of no effect in law, and such agreement shall be deemed and taken to be a simoniacal contract; and it shall and may be lawful for the queen's majesty, her heirs and successors, to present or collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical, for that one time or turn only; and the person so corruptly taking, procuring, or

Grant of
advowson
does not pass
void turn.

13 Anne,
c. 11.
Clerks in holy
orders may
not purchase
next presen-
tations.

(*u*) *Gibs. p. 758; Wats. c. 10, p. 89; Dyer, pp. 26 a, 282 b; Brooks-bie's case, Cro. Eliz. p. 173; Bp. of Lincoln v. Wolferstan, 3 Bur. p. 1512, where the true reason is said to be the danger of simony: Gorge and Dalton's case, 3 Leon. p. 196; 2 Roll. Abr. p. 45. In Grey v. Hesketh, Lord Hardwicke was of opinion, that the sale of an advowson, during the vacancy, is not within the statute of simony, but is void at the common law; though if more money had been given by reason of the vacancy, it might be within the statute: Amb. p. 268. This, how-*

ever, seems not accurate. The sale of the advowson is good—but the presentation does not pass: Fox v. Bp. of Chester, 6 Bing. p. 16. This does not apply to the king; but by the general grant by the crown of a manor to which an advowson is appendant, a void turn does not pass: Dyer, p. 300 a; Jane's case, Cro. Jac. p. 198; Gorge and Dalton's case, 3 Leon. p. 196. As to the void turn of a donative, see Lowe v. Bp. of Chester, 10 Q. B. D. p. 408, and p. 258, supra. Vide infra, Part IV., Chap. III., sect. 3.

accepting any such benefice, dignity, prebend, or living, shall thereupon and from thenceforth be adjudged a disabled person in law to have and enjoy the same benefice, prebend, dignity, or living ecclesiastical, and shall also be subject to any punishment, pain or penalty, limited, prescribed, or inflicted by the laws ecclesiastical, in like manner as if such corrupt agreement had been made after such benefice, dignity, prebend, or living ecclesiastical had become vacant; any law or statute to the contrary in any wise notwithstanding."

Canon law.

The canon law ordered that any clergyman who purchased the right of patronage, or next presentation, should be deprived of it "*ipso jure*" (x).

Limits of operation of statute.

But this statute being only restrictive upon clergymen, all other persons have continued to purchase next avoidances as they did before. The purchase by a clergyman of another's life estate in an advowson is not within the prohibition of the statute, even though by such purchase he in fact acquire only one presentation (y).

Descent of advowsons.

Advowsons descend to the heir, like other real property, and are assets for the payment of debts (z).

May be devised by will, by the old law,

By last will and testament the right of presenting to the next avoidance, or the inheritance of an advowson, may be devised to any person; and if such devise be made by the incumbent of the church, the inheritance of the advowson being in him, it is good though he die incumbent; for although the testament has no effect but by the death of the testator, yet it has an inception in his lifetime. And so it is, though he appoint by his will who shall be presented by the executors, or that one executor shall present the other, or devises that his executors shall grant the advowson to such a man (a).

But by a general devise of lands, an advowson in gross will not pass; but by the words tenements and hereditaments, it will, for an advowson is an hereditament (b). It may also be entailed within the statute *De donis*, being an hereditament annexed to land; but an estate tail in an advowson could not be discontinued, for nothing passes by the grant of it but what the owner may lawfully give (c).

by 1 Vict. c. 26.

But now by 1 Vict. c. 26, s. 1, it is provided that the words "real estate" shall include advowsons.

Word "living" in a devise passes advowson.

The word "living" is sufficient to pass the advowson, but it may be restricted to the next presentation. The context must determine which is its meaning. A devise to a minor of the livings of Q. and C., "should he like the profession, and be qualified for them," was holden to show an intention to confer

(x) X. iii. 38, 6.

(y) *Walsh v. Bp. of Lincoln*, L. R., 10 C. P. p. 518.

(z) 3 Vin. Abr. p. 145; *Robinson v. Tonge*, 1 Bro. P. C. at p. 114.

(a) *Wats. c. 10*, p. 90.

(b) *Pynchyn v. Harris*, 3 Atk. p. 61; *Westfaling v. Westfaling*, Cro. Jac. p. 371; *Gully v. Bp. of Exeter*, 4 Bing. 290; *Pocock v. Bp. of Lincoln*, 3 B. & B. p. 27.

(c) 3 Cruise, Digest, p. 6.

on the devisee a personal benefit, so that the devise was confined to a single presentation, and did not extend to the advowson (*d*).

A private act of parliament, after providing for a sale of glebe land, and the erection of an additional church with part of the proceeds, directed that the curate of the new church should, during the incumbency of A., the then rector, be appointed by him; and that after the death, avoidance, or resignation of A., the new church should become the principal church, with all the accustomed rights, immunities and privileges appertaining to a mother church, and the then church should become and be deemed a chapel of ease thereto, to be served by a minister capable of having cure of souls; and that "the patronage of or right of presentation to the chapel, as well as the patronage of or right of presentation to the new church, should be vested in the patron of the rectory, his heirs and assigns, so nevertheless that the minister of the chapel should not be removable at pleasure:"—Holden, that the chapel of ease thus created by the act was thereby made presentative and not donative (*e*).

Chapel of ease made by private act of parliament presentative and not donative.

There are several ways by the canon law by which the right of patronage is lost: as by cession, where the patron confers his right on the church himself. 2ndly, "*Patientia reformatæ ecclesiæ*," as when the patron suffers the church, without a reservation of the right accruing to him, to become a collegiate church. 3rdly, By total ruin of the church either by an earthquake, or fire, or any otherwise. 4thly. When such church shall be seized by infidels. 5thly. If the patron shall commit any notorious crime for which, as a punishment, he shall forfeit the right of patronage, as heresy, and the like (*f*). For heretics forfeit all their goods and estates, among which we may reckon the right of patronage.

How advowsons might be lost by the canon law.

Upon an outlawry here in England, the king presents to a living in the right of the patron, if the patron be outlawed (*g*).

Outlawry.

SECT. 2.—*Exchange of Advowsons.*

One of the recommendations of the commissioners, mentioned by way of recital in the first act establishing the ecclesiastical commissioners (6 & 7 Will. 4, c. 77), was, "that such alterations be made in the apportionment or exchange of ecclesiastical patronage among the several bishops as shall be consistent with the relative magnitude and importance of their dioceses when newly arranged, and as shall afford an adequate quantity of patronage to the bishops of the new sees."

Recommendations of ecclesiastical commission.

This and all other recommendations contained in the preamble

(*d*) *Webb v. Byng*, 2 Kay & J. (1846).

p. 669.

(*f*) X. v. 7, 13 and 15.

(*e*) *Reg. v. Foley*, 2 C. B. p. 664

(*g*) Ayl. Par. p. 417.

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to this act were to be carried into effect by schemes framed by the ecclesiastical commissioners and confirmed by order in council. Orders in council were made confirming schemes of the commissioners for this purpose, and were gazetted on June 4, 1852, Aug. 5, 1859, and July 26, 1861.

16 & 17 Vict.
c. 50.

By 16 & 17 Vict. c. 50, reciting that it is expedient to extend the power given by 6 & 7 Will. 4, c. 77, it is enacted as follows:—

Power for
archbishop,
&c., by au-
thority of a
scheme of
ecclesiastical
commis-
sioners, to
exchange
patronage.

Sect. 1. "It shall be lawful for any archbishop, bishop, or any other ecclesiastical corporation, sole or aggregate, by the authority of a scheme of the ecclesiastical commissioners for England ratified by her Majesty in council, and duly gazetted, to assign and transfer the patronage of any benefice or benefices of which he shall be seised in right of his see, or other preferment held by him by way of exchange only, and not otherwise, to any archbishop, bishop or other ecclesiastical corporation, sole or aggregate, who is and are hereby authorized to accept and acquire and hold the same, or to any other person, for the patronage of any other benefice or benefices; and from and after the publication of the scheme and order in council effecting such transfer, the benefice or benefices and patronage thereby purporting to be transferred and exchanged shall be and remain thereby duly vested in the respective archbishop, bishop, or other ecclesiastical corporation, sole or aggregate, or other person party to such exchange, without any transfer, conveyance or assurance in the law other than the said scheme and order so published in the Gazette as aforesaid" (*h*).

Commis-
sioners before
submitting
scheme for
approval to
inquire into
and certify
particulars.

Sect. 2. "Provided that in every such case the said ecclesiastical commissioners shall, before submitting such scheme for the consideration and approval of her said Majesty in council, make due inquiry into the circumstances of the proposed exchange, and into the equal or relative value of the benefice or benefices and patronage proposed to be thereby transferred, and shall certify the same to her Majesty, with such particulars thereof as may be necessary to show that such exchange is made in conformity with the intentions of the said recited act."

What persons
are subject to
this act.

By the definition clause in sect. 3, the word "person" is to include any corporation, the head of any college "or collegiate establishment" or hospital, "and the governing body respectively entitled in his or their corporate capacity to any such patronage" and the Crown; and provision is made in this and the following section for the manner in which the assent of the Crown is to be signified, and for the patronage of the benefices taken in exchange by the Crown following the same course as that of those for which they are exchanged.

23 & 24 Vict.
c. 124.

By 23 & 24 Vict. c. 124, s. 42, any "person" as defined

(*h*) Orders in Council made under this act will be found indexed under the name of the benefice in the col-

lection of Ecclesiastical Commissioners' Orders in Council, printed by the Queen's printers.

above may, under the provisions of the last act, exchange any advowson or ecclesiastical patronage for any advowson or ecclesiastical patronage belonging to any ecclesiastical corporation aggregate or sole or any other person.

Special provisions as to the exchange of patronage in the diocese of Newcastle were made by 47 & 48 Vict. c. 33, s. 12, and in the diocese of Truro by 50 & 51 Vict. c. 12, s. 14. Newcastle and Truro.

The following powers have been given in the acts relating to the ecclesiastical commissioners for the purpose of authorizing the exchange of advowsons where such exchange will in any way tend to make better provision for the cure of souls in any parish affected by it. They extend to exchanges between all persons :—

By 3 & 4 Vict. c. 113, s. 73, "With an especial view to the better care of populous parishes," "arrangements may from time to time be made by the like authority for improving the value or making a better provision for the spiritual duties of ill-endowed parishes or districts by means of such exchange of advowsons, or of such other alterations in the exercise of patronage as may be agreed upon by patrons, with the consent of the bishop in every such case, or in the case of benefices lying in more than one diocese, then with the consent of the bishop of each diocese, and where a bishop is himself one of the patrons, with the consent of the archbishop."

3 & 4 Vict.
c. 113.

Provisions for securing the better performance of spiritual duties in ill-endowed parishes.

By 4 & 5 Vict. c. 39, s. 22, "It is declared and enacted that it shall be competent for the ecclesiastical commissioners by scheme confirmed by order in council to make arrangements . . . for improving the value or making a better provision for the spiritual duties of ill-endowed parishes or districts by means of the exchange of advowsons or other alterations in the exercise of patronage, notwithstanding that such advowsons or any or either of them or such patronage shall be vested in or belong to any ecclesiastical corporation aggregate or sole."

4 & 5 Vict.
c. 39.

Provisions respecting exchange of advowsons to authorize exchange by ecclesiastical corporations.

Sect. 23. "Whenever it shall be made to appear to the ecclesiastical commissioners for England that it would be expedient to make an exchange of an advowson, or of any right of patronage, for any other advowson or right of patronage, with a view to proceedings being taken for the union of two or more benefices under the provisions of 1 & 2 Vict. c. 106, s. 16, it shall be lawful for the said commissioners, with the consent of the patron or patrons of every such advowson or right of patronage, and also, in case any such advowson or right of patronage shall be vested in or belong to any ecclesiastical corporation, aggregate or sole, with the consent of the bishop of the diocese, or in the case of benefices lying in more than one diocese then with the consent of the bishop of each diocese, and where a bishop shall be himself one of the patrons, with the consent of the archbishop of the province, to certify the same to such archbishop; and thereupon if the said archbishop shall think fit, proceedings may be taken under, and in pursuance of the provisions of the said

Exchanges of advowsons may be made for the purpose of unions.

last-mentioned act for effecting the union of such benefices; and the said archbishop, at the same time that he shall certify to her Majesty in council the inquiry and consent referred to in the same act, shall transmit such certificate of the said commissioners to her Majesty in council, together with an abstract of the title to any advowson or right of patronage mentioned in the certificate of the said commissioners, other than advowsons or rights of patronage belonging to any such ecclesiastical corporation as aforesaid, and the opinion of counsel on such title; and thereupon it shall be lawful for her Majesty in council, in any order for such licence made and issued under the provisions of the same act, to order that such exchange as aforesaid shall take effect; and upon such order being made and registered pursuant to the said act the said exchange shall be valid and effectual without any other assurance in the law, and notwithstanding that the advowsons or rights of patronage or any or either of them exchanged by virtue of the said order, were or was previously thereto vested in or belonged to any such ecclesiastical corporation as aforesaid; and the respective exchangees, their heirs, appointees, successors and assigns shall thenceforth stand seised of the advowsons or rights of patronage so taken in exchange, in the same manner to all intents and purposes, and subject to the same trusts, powers, limitations, charges, and incumbrances (if any) as the advowsons or rights of patronage by them given in exchange were respectively held and were subject."

Order to
operate as
conveyance.

By 31 & 32 Vict. c. 114, s. 12, the order in council confirming a scheme is to be effectual for vesting in the several corporations or persons mentioned in the scheme the advowsons respectively assigned to them therein, without any conveyance, and for enabling such corporations or persons to hold them in spite of any law to the contrary (*h*).

31 & 32 Vict.
c. 114.
Powers of
former acts
extended.

By 33 & 34 Vict. c. 39, the powers and provisions contained in 3 & 4 Vict. c. 113, s. 73; 4 & 5 Vict. c. 39, s. 22; 31 & 32 Vict. c. 114, s. 12, shall be held to authorize "the transfer, by the process and with the consents therein mentioned, of the ownership of any advowson or other right of patronage in any spiritual preferment, or any estate or interest in the same; provided always that it shall appear to the ecclesiastical commissioners for England, and shall be so stated in the scheme submitted by them to her Majesty in council for effecting such transfer, that the same transfer will tend to make better provision for the cure of souls in the parish or district in or in respect of which the right of patronage or advowson arises or exists; and provided always, that such transfer may take effect as from or to any ecclesiastical corporation, aggregate or sole, notwithstanding any statute of mortmain."

33 & 34 Vict.
c. 34.
Exchanges in
the metro-
polis.

By 23 & 24 Vict. c. 142, s. 12, advowsons may be exchanged for facilitating unions of benefices in the metropolis, under that act (*i*).

(*h*) Vide *infra*, p. 403.

(*i*) Vide *infra*, p. 410.

SECT. 3.—*Presentations.*—*Who may present.*

We will now consider who may present or nominate a clerk in holy orders, and under this head will be mentioned :—

1. Infants.
2. Executors.
3. Heirs.
4. Trustees—Brethren of hospitals.
5. Parishioners.
6. Municipal corporations.
7. Husbands—Tenants by the courtesy—Tenants in dower.
8. Coparceners.
9. Mortgagees—Mortgagors.
10. Tenants by statute merchant.
11. Bankrupts.
12. The Crown.
13. The Lord Chancellor.
14. Papists.

But, first, it must be premised that presentation, nomination and collation are sometimes used in law for the same thing, and yet they are commonly distinguished, for presentation is an offering of the clerk to the ordinary, and nomination may be the offering of a clerk to him that may and ought to present him to the ordinary, by reason of a grant made by him that has the power of presenting, obliging him thereto; and collation is the giving of the church to the clerk, and is that act by which the ordinary admits and institutes a clerk to a church or benefice of his own gift, in which case there is no presentation (*j*).

Differences
between pre-
sentation,
nomination,
and collation.

For it is to be observed, that the right of nomination may be in one person, and the right of presentation in another. And this is where he who was seised of the advowson grants unto another and his heirs that as often as the church becomes void, the grantee and his heirs shall nominate to the grantor and his heirs, who shall be bound to present accordingly. In which case it was agreed by the whole court in the case of *Sherley and Underhill* (16 Jac.), that the nomination is the substance of the advowson, and the presentation no more than a ministerial interest; and that if the presenter shall present without nomination, or the nominator present in his own person, each shall have his *quare impedit* for the security of their respective rights. And if the nominator neglect to appoint his clerk till lapse incurs, and then the patron presents before the bishop collates, the bishop is bound to admit his clerk (*k*).

Nomination.

(*j*) Wats. c. 15, p. 149; 1 Inst. p. 120. Vide supra, p. 263.

(*k*) Gibs. p. 794; Mo. p. 894;

Dyer, p. 48 a; 17 Vin. Abr. p. 315, pl. 5; 3 Cruise, Digest, p. 4; see *Throckmerton v. Tracey*, Flow.

Must be to a void benefice.

Presentation must be to a void benefice (*l*).

A presentation may be to a deanery, archdeaconry, prebend, hospital, church or chapel (*m*).

By an infant.

Guardian by nurture or in socage of a manor, whereunto an advowson is appendant, shall not present to the church, because he can take nothing for the presentation for which he may account to the heir, and therefore the heir in that case shall present, of what age soever (*n*). And of this opinion was the late Lord Chancellor King, in a cause in the Court of Chancery, in the year 1732. An infant, he said, of one or two years old may present at law, then why may he not nominate? Does the putting a mark and seal to a nomination require more discretion than to a presentation? The guardian is supposed to find a fit person, and the bishop to confirm his choice, and if this be permitted in law, why should a court of equity act otherwise in equitable estates (*o*).

By executors.

If one be seised of an advowson in fee, and the church becomes void, the void turn is a chattel; and if the patron dies before he does present, the avoidance does not go to his heir, but to his executor in presentative benefices (*p*). For the void turn of a donative, it descends to the heir (*q*).

By the heir.

But if the incumbent of a church be also seised in fee of the advowson of the same church and dies, his heir, not his executors, shall present; for although the advowson does not descend to the heir till after the death of the ancestor, and by his death the church is become void, so that the avoidance may be said in this case to be severed from the advowson before it descend to the heir, and to be vested in the executor, yet both the avoidance and descent to the heir happening at the same instant, the title of the heir shall be preferred as the more ancient and worthy (*r*).

If the testator do present, and (his clerk not being admitted before his death) then his executors do present their clerk, the ordinary is at his election which clerk he will receive (*s*). But per Windham, J., the bishop in this case is not obliged to admit any other clerk than he who was first presented; for the present-

p. 157; *Att.-Gen. v. Marquis of Stafford*, 3 Ves. p. 80; *Arthington v. Coverly*, 2 Abr. Ca. Eq. p. 518; *Rex v. Marquis of Stafford*, 3 T. R. p. 646; *Reg. v. Trustees of Orton*, 14 Q. B. p. 139; *Boyer v. Bp. of Norwich*, 1892, P. p. 41; 1892, A. C. p. 417.

(*l*) *Owen v. Stainoe*, Skin. p. 45. *S. C. nom. Stainhoe v. Owen*, L. T. Jones, p. 199. Vide supra, p. 165.

(*m*) 2 Roll. Abr. p. 342; Com. Dig. tit. Eglise, H. 1.

(*n*) 3 Inst. p. 156.

(*o*) Wats. c. 13, p. 140; *Arthington v. Coverly*, 2 Abr. Cas.

Eq. p. 518.

(*p*) Wats. c. 9, p. 72; 1 Inst. p. 388 a; *Rex v. Bp. of Canterbury*, Owen, p. 155; *S. C. nomine Regina v. Fane and the Abp. of Canterbury*, 1 Leon. p. 201; 4 Leon. p. 109; F. N. B. p. 34 a; *Repington v. Governors of Tamworth School*, 2 Wils. p. 150; *Rennell v. Bp. of Lincoln*, 3 Bing. 234.

(*q*) Vide, p. 288, infra.

(*r*) *Holt v. Bp. of Winchester*, 3 Lev. p. 47; *Smalwood v. Bp. of Litchfield*, 1 Leon. p. 205.

(*s*) Wats. c. 9, p. 72.

ment of the testator is not countermanded by his death (*t*); and the executor shall have *quare impedit* for a disturbance to the testator (*u*).

It has been decided by the House of Lords, in the case of *Rennell v. The Bishop of Lincoln*, that where an advowson belongs to a prebendary in right of his prebend, and the church becomes vacant, and the prebendary dies without having presented, the right of presentation belongs to his personal representative. The judgment of the Court of Common Pleas in this cause, delivered in Michaelmas Term, 1825, by a majority of three judges to one (*x*), was reversed by the Court of King's Bench in Trinity Term, 1829, by three judges to one (*y*), and the last decision was established upon the opinions of the majority of six out of eight judges in the House of Lords, in Easter Term, 1832, by Lord Lyndhurst, Lord Wynford hesitating; the six were, Bosanquet, J., Parke, J., Gaselee, J., Littledale, J., Bayley, B., Tindal, C. J.; the two dissenting were, Bolland, B., and Park, J. (*z*).

Personal representative of prebendary presents to an advowson attached to a prebend, prebendary having died during its vacancy.

But, in the case of a bishop, the void turn of a church, the advowson whereof belongs unto him in the right of his bishopric, by his death goes not to his executor; but when the temporalities of the bishopric are seised into the king's hands, the king shall present (*a*). This is said by Baron Bayley, in the case cited above, to be the "single exception" (*b*).

Case of deceased bishop exceptional.

So if the parson of a church ought to present to a vicarage; if the vicarage becomes void during the vacancy of the parsonage, the patron of the parsonage, and not the executor of the deceased parson, shall present (*c*); but if the parson be made a bishop, in such case he shall present (*d*).

Patron paramount.

A grant of the next avoidance to one without his privity is held a resulting trust for the grantor, no other trust being declared (*e*). A. seised in fee devised his lands and tenements to trustees, to apply part of the rents in augmentation of eight several vicarages. The church of B. became vacant; decreed that the heir of A. shall present (*f*). R. S., rector of B., devised his perpetual advowson of B. with the appurtenances to G. S., willing and desiring her to sell it to Eton College, and, on their refusal, to Trinity College, and on the refusal of both, to any other college in Oxford or Cambridge being the best purchaser. This is not a resulting trust of the advowson to the

Advowson in trustees.

(*t*) *Smalwood v. Bp. of Coventry*, Savile, p. 95.

(*u*) *Ibid.* p. 118.

(*x*) 3 Bing. p. 223.

(*y*) 7 B. & C. p. 113.

(*z*) The case is reported as *Mirehouse v. Rennell* in the House of Lords. The opinions of the eight judges are given in 8 Bing. p. 490, and also in 1 Cl. & Fin. p. 527, where will be found the speeches of Lords

Lyndhurst and Wynford.

(*a*) 2 Roll. Abr. p. 345.

(*b*) 8 Bing. p. 550. See *Ex parte Tarrant*, Romilly, p. 119.

(*c*) 2 Roll. Abr. p. 346.

(*d*) *Rennell v. Bp. of Lincoln*, 7 B. & C. pp. 134, 149.

(*e*) *Duke of Norfolk v. Browne*, Ch. Pre. p. 80.

(*f*) *Kensey v. Langham*, Ca. t. Talb. p. 143.

heirs of the testator, but a devise of the beneficial interest therein to G. S., with an injunction only to sell to particular societies, and on an avoidance by the death of the testator, the devisee, and not the heir, shall present (*g*). Where there are several *cestuis que trusts* of a presentation, they must all agree, or there can be no nomination (*h*). Trustees have an advowson, with directions to present in a certain time. This is directory only, and they may do it afterwards, but they must join in the presentation. General disusage is evidence to lay aside that part of their constitution which arose by consent (*i*). Where trustees have a power to elect a vicar, they must all join, or the bishop may refuse their nominee. Election as well as presentation is requisite on the part of the trustees, and they shall give notice of their meeting, and if the election be not fair, the court will not compel all the trustees to join in the presentation. The election in such a case is a personal trust, and cannot be executed by proxy (*j*). R. devised his manors, advowsons, &c., to pay his son 1,000*l.* a year out of the rents and profits, and directed the rest to be laid out and settled. It was holden that the presentation to a vacant living went to the heir as undisposed of (*k*). By a devise of lands, tenements and hereditaments (subject to a term of eleven years) in trust to receive the rents, issues and profits, from time to time, and to dispose, &c., an advowson in gross passes, and a sale of the next presentation within the term by direction and for the benefit of the *cestui qui trust* was established (*l*). Where, by neglect, the number of trustees to present to a living was not filled up at the time of an avoidance, the court could not by an injunction prevent the effect of a presentation under the legal title of the heir of the surviving trustee without special ground, but the court will take care that the trust shall be properly filled up in future (*m*). Where the trust of an advowson is to present some fit person, such as the inhabitants and parishioners, or the major part of the chiefest and discreetest of them, should nominate, the right of election is in the inhabitants above the age of twenty-one, paying the church and poor rates, and popular election by a majority of such voters and others not so qualified has been established (*n*). The doctrine of a resulting trust was holden not to apply, where the whole estate had been devised away from the heir; and it was said that if a person seised of an advowson be also incumbent, and devises it, the devisee, and not the heir, shall nominate after his death (*o*).

(*g*) *Hill v. Bp. of London*, 1 Atk. p. 618.

(*h*) *Seymour v. Bennet*, 2 Atk. p. 483; *Att.-Gen. v. Scott*, 1 Ves. p. 413; *Wilson v. Kershaw*, 7 Bro. P. C. p. 296. Vide infra, p. 287.

(*i*) *Att.-Gen. v. Scott*, 1 Ves. p. 414.

(*j*) *Wilson v. Dennison*, Amb. p. 82; *Att.-Gen. v. Scott*, 1 Ves.

p. 414.

(*k*) *Sherrard v. Lord Harborough*, Amb. 163.

(*l*) *Earl of Albemarle v. Rogers*, 2 Ves. Jun. p. 477.

(*m*) *Att.-Gen. v. Bp. of Lichfield*, 5 Ves. p. 824.

(*n*) *Fearon v. Webb*, 14 Ves. p. 13. Vide infra, p. 282.

(*o*) *Hawkins v. Chappell*, 1 Atk.

If trustees have the right of presentation only upon the nomination of others, they are in the case of a donative to judge of the fitness of the person nominated, as a bishop does, and may absolutely reject on the ground of his being illiterate; but if they reject on the ground of immorality, that issue might be tried by a jury on the return of a mandamus to the trustees to admit (*p*).

Their power
in case of
donative
to reject.

In *Bristow v. Skirrow* (*q*), the testatrix directed her trustees to sell the advowson of F. immediately after the death of H., the present incumbent, but on no account to sell it to any member of the family of H.; the proceeds of such sale to fall into her residuary personal estate. It was holden that the next presentation was vested in the trustees, and that they must present.

Bristow v.
Skirrow.

In *Reg. v. Trustees of Orton* (*r*), an advowson was vested in feoffees, in trust, upon every avoidance, to present to the ordinary such person as should be elected by a majority of the landowners in a parish. On motion for a mandamus to the trustees to present a clerk, on the ground that he has been so elected, it was holden that either the remedy of the landowners against the trustees was in equity for a breach of trust, or if the landowners had a legal right their remedy was by *quare impedit*, and that in either case the mandamus would not lie. It was holden, also, that the remedy, if any, of the clerk was in equity, and that he had no legal right.

Reg. v. Trus-
tees of Orton.

It was holden by the Lord Chancellor, Lord Cranworth, and the Lord Justice Knight Bruce, reversing in part the decision of the Master of the Rolls, that where a testator devised to trustees an advowson, in trust to sell upon the death of the then incumbent and to divide the proceeds between seven persons equally as tenants in common, on the death of the incumbent the right to present was vested in the seven, and they not agreeing among themselves as to its exercise, it must be determined by lot which of them should nominate the clerk to be then presented by the trustees (*s*).

Johnstone v.
Baber.

Where testator devised his manors, advowsons, &c., to trustees to pay his son an annuity of 1,000*l.* for life, and the rest of the profits to be laid out in land during his son's life, and then settled, it was holden that the son had a right to present to a living when vacant, not under the devise, but as heir at law, it being a fruit undisposed of (*t*).

Sherrard v.
Lord Har-
borough.

Where a hospital for the relief of poor, needy and impotent people is duly incorporated, and consists of a master and twelve

Living
attached to
a hospital,

p. 622. See also *Rex v. Masheter*, 1 Nev. & P. 314; 6 A. & E. p. 153; *Rex v. Davie*, ib. p. 374; *Briggs v. Sharp*, L. R., 20 Eq. p. 317; *Cooke v. Cholmondeley*, 3 Drew. p. 1.

(*p*) *Rex v. Marquis of Stafford*, 3 T. R. p. 646.

(*q*) 5 Jur., N. S. p. 1379 (A.D. 1859).

(*r*) 14 Q. B. p. 139.

(*s*) *Johnstone v. Baber*, 6 De G., M. & G. 439; 2 Jur., N. S. p. 1053; 22 Beav. p. 562. See *Briggs v. Sharp*, L. R. 20 Eq. p. 317; *Welch v. Bp. of Peterborough*, L. R. 15 Q. B. D. p. 432.

(*t*) *Sherrard v. Lord Harborough*, Amb. p. 164.

right of majority of poor brethren with master to present.

poor brethren, and the advowson of a living is conveyed to them to hold to the use of the master and brethren and their successors for ever, the right to nominate to the living belongs to the majority of the entire body of master and brethren; and the master's concurrence in the act of the majority is not necessary.

Where the majority have nominated the clerk at a corporate meeting, and the master refuses to put the common seal to a presentation, the court will compel him to do so by mandamus; and if the master in his return to the writ merely insists on his right to withhold his consent and to refuse to seal it, he cannot object that there was no corporate resolution under seal; or that the writ insufficiently states his custody of the seal; or that no presentation has been actually tendered to him for signature; or that the majority, having only voted orally for the prosecutor of the writ, may retract their resolution; and it is no answer to the writ that there are visitors appointed by the founder, to whom disputes between the master and brethren are to be referred (*u*).

Advowson in hands of parishioners.

The principal cases on the subject of advowsons in the hands of parishioners are *Att.-Gen. v. Parker* (*x*), *Att.-Gen. v. Forster* (*y*), *Att.-Gen. v. Newcombe* (*z*), *Fearon v. Webb* (*a*).

It was holden by the Lords Justices, reversing the decision of Vice-Chancellor Kindersley, that the right to elect an incumbent of a parish, which right was formerly vested in the inhabitants and parishioners paying rates, still remains in them and is not vested in the vestry elected under the Metropolis Local Management Acts (*b*). It seems such an election may be by ballot (*c*).

As to advowsons in the hands of the parishioners, the following provisions have been made by a recent act:—

19 & 20 Vict. c. 50.

By 19 & 20 Vict. c. 50, reciting that it is expedient to authorize the sale of advowsons in cases where the same are vested in, or in trustees for, inhabitants, ratepayers, freeholders or other persons, forming a numerous class, and deriving no pecuniary advantage therefrom, in order that the moneys arising from such sales may be applied to the erection, re-building or improvements (where necessary) of parsonage houses, and to the augmentation of the livings (where the same are small), and to other beneficial purposes as hereinafter provided; and that other powers should be conferred upon such persons, it is enacted as follows:—

Interpretation of certain terms.

By sect. 1, "The word 'advowson' means an advowson vested in inhabitants, ratepayers, freeholders or other persons,

(*u*) *Reg. v. Kendall*, 1 Q. B. p. 366.

(*x*) 3 Atk. p. 576.

(*y*) 10 Ves. p. 335.

(*z*) 14 Ves. p. 1.

(*a*) *Ibid.* p. 13.

(*b*) *Carter v. Cropley*, 8 De G. M. & G. p. 680; 2 Jur. N. S. p. 1200;

3 *Ibid.* p. 171.

(*c*) *Shaw v. Thompson*, L. R. 3 Ch. D. p. 233. See generally, as to such advowsons, *Re St. Stephen, Coleman Street*, L. R. 39 Ch. D. p. 492.

forming a numerous class, or in trustees appointed by or acting on behalf of such persons, such persons deriving no pecuniary advantage from the exercise of such right, but does not mean an advowson belonging to any endowed charity within the provisions of 'The Charitable Trusts Act, 1853,' and 'The Charitable Trusts Amendment Act, 1855,' or either of them."

Sect. 2. "The owners of an advowson may direct the sale of such advowson; and the incumbent for the time being of the church or benefice, if required in writing by ten owners, shall convene a meeting of the owners, to be held at some convenient place near to the church, for the purpose of deciding whether or not such advowson shall be sold; and every such meeting shall be called by public advertisement, to be inserted once at least in four consecutive weeks in some newspaper circulating in the county and neighbourhood in which such church shall be situate, the last of such insertions being not more than fourteen nor less than seven days prior to any such meeting, and notice of such meeting shall also, not less than fourteen days prior to the holding thereof, be affixed upon the door of such church."

Power to direct sale of an advowson where required by owners present at a meeting convened for the purpose.

Sect. 3. "At the meeting so called the incumbent for the time being (if present) shall be the chairman, and if he be absent, then one of the owners present, being appointed by the other owners present, shall be the chairman, and the decision of the majority of the owners then present shall bind the minority and all absent parties."

Majority of owners present to bind minority.

Sect. 4. "Such meeting shall consider and determine the question whether the advowson shall be sold, and if that question be resolved in the affirmative, the existing trustees (if such there be) shall be the persons to execute the purposes of this act; but if there be no existing trustees, the owners shall proceed to appoint at that meeting, or at some adjournment thereof, not less than five nor more than eleven persons, being owners, to be 'elected trustees' for the purposes of this act, and the incumbent for the time being shall be *ex officio* an 'elected trustee' in addition to the trustees so appointed."

Meeting to decide question of sale, and if decided in affirmative to appoint persons to be "elected trustees."

By sect. 5, a certificate by two justices of the consent of the owners having been obtained, and of the names of the "elected trustees" (if any), shall be sufficient evidence of such consent and appointment.

By sect. 6, if it is determined to sell the advowson, the same shall become absolutely vested in the trustees, and the trustees shall proceed to a sale.

Sect. 7. "Any conveyance of an advowson in pursuance of this act shall be by deed (duly stamped) under the hands and seals of any three of the trustees, in which the consideration shall be truly stated."

As to conveyance of the advowson.

By sect. 8, the receipts of the trustees shall be sufficient discharges.

Sect. 9. "The moneys to be received by the trustees from or

Application of moneys.

by means of such sale shall be applied by them in the following order :—

- 1st. In payment of the costs, charges and expenses occasioned by any meeting of owners as aforesaid, and by the execution of the powers by this act conferred upon the trustees, or incident thereto respectively :
- 2nd. If there be no parsonage house attached to the advowson so sold, or if the parsonage house attached thereto be dilapidated or insufficient, then in payment of the expense of erecting a parsonage house, and of providing a site for the same, or in the reconstruction or repair of the existing parsonage house, or in making any requisite additions thereto, as the circumstances of the case may require :
- 3rd. If the living be under the gross yearly value of one hundred and fifty pounds, then in investing a sum sufficient to produce an annual income which, together with the existing annual income, will raise the yearly value of the living (exclusive of the parsonage house) to not exceeding one hundred and fifty pounds per annum :
- 4th. If the fabric of the church be in such a state as to require immediate repair, then in the expenditure upon the fabric of a sum sufficient to place the same in sufficient repair :
- 5th. In the investment of a sum the annual income whereof will, in the opinion of the trustees, be sufficient to maintain the fabric of the church in complete repair :
- 6th. In the erection of schools in connection with the church, or of a chapel of ease in the parish, township, ecclesiastical district, or place in which such church is situate, or of a parsonage house to a chapel of ease, or in providing a site for a chapel of ease or a parsonage house, or in the endowment of a chapel of ease, or in contributing to such objects or any of them, as the trustees may in their discretion see fit :
- 7th. If there be no such purposes to which such moneys are applicable, or if there be a surplus of such moneys after answering such purposes, then such moneys, or the surplus thereof, as the case may be, shall be invested, and the annual income thereof shall be applied, in aid of the rates levied for the relief of the poor of the parish, township or place in which the church is situate, or in aid of any improvement rate levied therein :—

Provided always, that the owners at any meeting convened and held in manner hereinbefore provided may determine that any one or more of the objects mentioned in the fifth, sixth and seventh heads of application respectively shall have priority over any other object mentioned in those heads."

SECT. 11. "The concurrence of two-thirds at least of the whole number of trustees shall be necessary to give effect to any resolution of the trustees, and every resolution of the trustees in

Concurrence
of two-thirds
of trustees
necessary to

which that number shall concur shall be binding upon the other trustees and upon the owners on whose behalf such trustees are authorized to act.” give effect to resolutions.

By sects. 10, 12, provisions are made for investing the moneys received on any sale and for supplying vacancies in the number of the trustees.

By sect. 13, the trustees are not to be accountable for involuntary losses.

Sect. 14. “In case of the death, cession or resignation of any incumbent of a benefice after the owners shall have directed the advowson of such benefice to be sold, but before the sale shall have been effected, then the persons in whom the right of presentation and nomination would but for this act have been vested shall (under and subject to the conditions under which such right would but for this act have been exercised) present and nominate a person to such benefice as if this act had not been passed.” Vacancies in the incumbency before sale to be filled up.

In certain cases municipal corporations have been seised of the advowsons to livings. It was, however, considered inexpedient that this right of patronage should be retained and exercised by them; and provisions for this purpose were made by the great act for regulating municipal corporations, 5 & 6 Will. 4, c. 76, s. 139, as amended by 6 & 7 Will. 4, c. 77, s. 26. Advowsons in hands of municipal corporations.

Subsequently the statute 1 & 2 Vict. c. 31 was passed in order further to accomplish the sale of advowsons in the hands of municipal corporations.

These provisions have all been repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), and in lieu thereof the following enactments are made by that Act:— 45 & 46 Vict. c. 50.

Sect. 121.—(1) “Notwithstanding any sale by a municipal corporation of any advowson, or of any right of nomination or presentation to a benefice, ecclesiastical preferment, or office of priest, curate, preacher, or minister, whether the sale is made before or after the commencement of this act, the corporation and its property shall continue liable to the same obligation (if any) of providing for and maintaining or contributing to the maintenance of any priest, curate, preacher, or minister, as if the sale had not been made; and that liability may be enforced by the same means, at the instance of the Crown or otherwise, as if this act had not been passed, and the advowson or right had remained vested in the corporation. Provision as to sale of such advowsons.

(2) “Where a municipal corporation holds land subject to an obligation to provide a priest, curate, preacher, or minister, nothing in this act shall preclude the corporation from augmenting or endowing his office, either by assigning to him and his successors in office a competent portion of the land, or by charging thereon an annual stipend, either in money or in kind, for his and their use and benefit, except that no such augmenta-

tion or endowment shall be valid without the approval of the Treasury.

(3) "Where a municipal corporation sells a right of nomination to an ecclesiastical preferment, not being a benefice or perpetual curacy, that preferment shall, from and after the sale, be a benefice presentative, and the holder thereof and his successors shall be a body corporate, having perpetual succession, and capable of taking and holding in perpetuity all property granted to or purchased for them by the governors of the bounty of Queen Anne, or by other persons contributing with those governors as benefactors."

Sect. 122.—(1) "Where, at the passing of the Municipal Corporations Act, 1835, a body corporate, or any particular class, number, or description of members thereof, or the governing body thereof, were in their corporate capacity, and not as trustees of a charity, seised or possessed of any manor or land whereto any advowson or right of nomination or presentation to any benefice or ecclesiastical preferment was appendant or appurtenant, or of any advowson in gross, or of any right of nomination or presentation to a benefice, ecclesiastical preferment, or office of priest, curate, preacher, or minister, the advowson or right, if not sold before the commencement of this act, shall be sold at such time and in such manner as the ecclesiastical commissioners for England direct, so that the best price be obtained for the same.

(2) "Upon any such sale the council shall, with the consent in writing of those commissioners, signed by any three or more of them, convey, under the corporate seal, the advowson or right to the purchaser, or as he directs, and the advowson or right shall vest accordingly.

(3) "The proceeds of sale shall be paid to the treasurer and invested in government securities, and the income thereof shall go to the borough fund; or those proceeds, or any part thereof, may be applied towards the liquidation of any debt contracted by the body corporate before the passing of the Municipal Corporations Act, 1835.

(4) "Any vacancy arising before the sale shall be supplied by the presentation or nomination of the bishop or ordinary of the diocese in which the benefice or preferment is situate."

Presentation
by the hus-
band in right
of his wife.

If a feme covert has title to present, she cannot present alone, but the presentation must be by husband and wife; and that in both their names, and not only by the husband in right of himself and his wife. And although the right of patronage in the wife descends to her heir, yet the right of presenting during life belongs to the husband, who is tenant by courtesy (*d*).

Advowson in
tenant by
courtesy.

If a woman that has an advowson, or part of an advowson, to her and her heirs, takes an husband, the husband may not only

present jointly with his wife during the coverture (*e*), but also having issue by her, after her death. Though the right of patronage, so far as it was in the wife, descends to her heir, and though the wife did never present to it, but died before the church voided, the right of presenting during the husband's life is lodged in him, as tenant by courtesy, though his wife had but a seisin in law, because it is said he could by no industry attain to any other seisin (*f*). And if the church, in this case of the husband, void during his life, and then he die before the church is filled; yet the heir shall not have the turn, but the husband's executor. And if the church being void, the wife dies, having had no issue, so that the husband is not tenant by courtesy, yet he shall present to the void turn (*g*).

If a man that is seised of an advowson takes a wife, and dies, the heir shall have two presentments, and the wife the third; yea, and though the husband in his lifetime had granted away the third turn (*h*); that is, the wife may in a proper action recover the third presentation as her dower, or it may be assigned to her for dower; but without such recovery or assignment, the wife cannot make title to the advowson, or to any presentation, no more than she can enter by her own authority into any other lands or tenements to which she has right of dower. Or if a manor, to which an advowson is appendant, descends to an heir, and he assigns dower to his mother of the third part of the manor with the appurtenances, she is thereby endowed of the third part of the advowson, and may have the third presentment (*i*).

Advowson in tenant in dower.

If a man grants a third presentation, and his wife is entitled to it as part of her dower, the grantee will have the next presentation after the wife, because the wife's title arose from an act of law, which shall not operate to the prejudice of the grantee (*k*).

Where there are divers patrons, and they vary in their presentment, if they be joint-tenants, or tenants in common of the patronage, the ordinary is not bound to admit any of their clerks; and if the six months pass, then he may present by the lapse; but he may not present within the six months, for if he do, they may agree and bring a *quare impedit* against him, and remove his clerk, and so the ordinary shall be a disturber (*l*).

Advowson in co-parceners, joint-tenants, and tenants in common.

It has been shown that where an advowson is vested in

(*e*) The editor conceives that the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), has made no difference as to this.

(*f*) 1 Inst. p. 294; Mr. Hargreave's notes; Cruise Digest, pp. 6, 26.

(*g*) Wats. c. 9, p. 71; 21 H. 6, 56b; Bro. Abr., Presentment al. esglises.

(*h*) 1 Inst. p. 379 a; Dyer, p. 35 b.

(*i*) Wats. c. 9, p. 72; 1 Inst. p. 34b, 37.

(*k*) 1 Inst. p. 379 a; 3 Cruise, Digest, p. 10. See also 1 Inst. p. 249 a.

(*l*) Dr. & St. dialogue 2, c. 30; *Reynoldson v. Blake*, Ld. Raym. p. 197.

trustees, they are joint-tenants, and must all join in presentation (*l*). In like manner joint-tenants and tenants in common must join in any suit; the first because they are jointly seised, and claim by joint title; the latter out of necessity, because the thing is entire, and they are but as one person (*m*). And by the canon law, where divers did present, being either coparceners, joint-tenants, or tenants in common, the bishop, if he pleased, might judge of the fitness of the clerks, and choose which of them he would (*n*). It is said, however, by Lord Hardwicke, in the case of *Seymour v. Bennett* (*o*), that where there are parceners who cannot agree in one person, the Court of Chancery will direct them to draw lots who shall have the first presentation (*p*).

Right of the
elder sister.

But by the common law, if the patrons have the patronage by descent as coparceners, then is the ordinary bound to admit the clerk of the elder sister; for the eldest shall have the preference in the law, if she will (*q*); and then at the next avoidance, the next sister shall present, and so by turns one sister after another, till all the sisters, or their heirs, have presented (*r*), and then the eldest sister shall begin again; and this is called a presenting by turn; and it holds always between coparceners of an advowson, except they agree to present together, or that they agree by composition to present in some other manner; and if they do so, the agreement must stand. But if after the death of the common ancestor the church becomes void, and the eldest sister presents together with another of the sisters, and the other sisters every one in their own name or together; in that case the ordinary is not bound to receive any of their clerks, but may suffer the church to lapse; for he shall not be bound to receive the clerk of the eldest sister but where she presents in her own name (*s*). This part which the eldest thus takes by virtue of her priority of age, is called the "*enitia pars*" (*t*).

And in this case, where the patrons vary in presentment, the church is not properly said to be litigious; so that the ordinary shall be bound at his peril to direct a writ to inquire of the right of patronage, for that writ lies where two present by several titles; but these patrons present all in one title, and therefore the ordinary may suffer it to pass, if he will, into the lapse (*u*).

Privilege of
elder sister
passes to
assignee.

And the privilege of the elder sister to present first in turn, goes to her assignee; as in the case of *Buller v. Bishop of Exeter*, in 1749. The estate of an advowson descended to two daughters as parceners. The church became vacant twice in their time,

(*l*) Vide supra, p. 280.

(*m*) 1 Inst. p. 197 b.

(*n*) Gibs. p. 765; X. iii. 38, 3.

(*o*) 2 Atk. p. 482.

(*p*) See also 1 Inst. p. 166 b, Mr. Hargreave's note.

(*q*) Lord Loughborough's judgment in *Thrale v. Bp. of London*, 1 Black. H. p. 412.

(*r*) 2 Roll. Abr. p. 346.

(*s*) 1 Inst. pp. 186, 243; 2 Inst. p. 365.

(*t*) See, however, as to drawing lots in certain cases, *Johnstone v. Baber*, 6 De G. M. & G. p. 439, et supra, p. 281.

(*u*) Dr. & St. dialogue 2, c. 30.

and both joined in presentation. The elder marries, settles her own estate in the common way, and dies. The other daughter, before the living became vacant again, marries and makes a settlement of her part. A vacancy happening, Buller, the husband of the elder, entitled to her estate as tenant by courtesy, or under the settlement, claims as in her turn, and presents. But the bishop objects thereto, because the younger sister and her husband, claiming an equal right to presentation as tenants in common, did not join. So that there being a litigation, he was willing to admit the person appearing to have right in courts of law. Baron Clarke, sitting for the master of the rolls, said: "As it is impossible [for an advowson] to be divided into parts so as to be enjoyed separately, it is natural to follow the course that has been practised, that each parcener should have a turn to present and, to prevent confusion, begin with the eldest. And in all the cases where disputes have arisen, whether the alienee of the elder sister should have the same privilege, or whether it should go to the next sister, it is determined in favour of the alienee" ^(x).

Where an advowson descended to four coparceners, and the two first presented in their turn, and then a stranger usurped upon the third, it was held that upon the fourth avoidance the fourth daughter should not lose her turn on account of the usurpation suffered by the third daughter; and it made no difference that in this case the second turn was usurped by a person not a stranger to the church, as with respect to that turn he must be considered to be a stranger. When an advowson descends unto parceners, though one present twice, and usurps upon his co-heir; yet he that was negligent shall not be clearly barred, but another time shall have his turn to present when it falls ^(y).

Usurpation
upon one
coparcener.

The clerk of a coparcener being once complete incumbent, though he is afterwards deprived, the turn is served; and so it is where by reason of some incapacity the institution was voidable by sentence declaratory, but not void (as has been held, in case a layman is presented) because the church is full, until such sentence comes.

When the
turn is served.

But if, after presentation, institution, and induction, the church remains not only voidable, but by special declaration of the law merely and actually void (as for not reading the articles, or the like), there the turn is not served, but the presenter may present again, because the church was never full ^(z).

When not.

If a person presented by a coparcener, is incumbent, and de-

(x) 1 Vesey, p. 340; 2 Atk. p. 482. See *Barker v. Bp. of London*, Willes, p. 662; *Countess of Northumberland's case*, Mo. p. 455; *Harris v. Nichols*, Cro. Eliz. p. 19.

(y) Bro. Abr. Qu. Imp. pl. p. 118; *Barker v. Lomax*, Willes, p. 664.

See, however, Willes, p. 659; *Barker v. Bp. of London*, 1 Black. H. p. 418; *Birch v. Bp. of London*, 3 B. & P. p. 449; *Richards v. Earl of Macclesfield*, 7 Sim. p. 257.

(z) *Windsor's case*, 5 Co. p. 102; Gibs. p. 765.

prived, and the next presents, notwithstanding that the second is complete incumbent, yet if he is deprived, and the first restored, the turn is not served, because the restoring of the first is a recontinuing of his incumbency upon the foot of the former presentation, institution, and induction; who also dying incumbent, will be the last presentee (a).

7 Anne, c. 18. By 7 Anne, c. 18, s. 2, If coparceners or joint-tenants, or tenants in common, be seised of any estate of inheritance in the advowson of any church or vicarage, or other ecclesiastical promotion, and a partition shall be made between them to present by turns; thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn; as if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety to present in the first turn, the other of the other moiety to present in the second turn; in like manner, if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn. It was decided in *Attorney-General v. Bishop of Lichfield* (b), that this statute is not retrospective.

13 Edw. 1, st. 1, c. 5. By 13 Edw. 1, stat. 1, c. 5, "When an agreement is made between many claiming one advowson, and inrolled before the justices in the roll, or by fine, in this form, that one shall present the first time, and at the next avoidance another, and the third time another, and so of many in case there be many. And when one hath presented, and had his presentation, which he ought to have according to the form of their agreement and fine, and at the next avoidance he to whom the second presentation belongeth is disturbed by any that was party to the said fine, or by some other in his stead; it is provided, that from henceforth they that be so disturbed shall have no need to sue a *quare impedit*, but shall resort to the roll or fine; and if the said concord or agreement be found in the roll or fine, then the sheriff shall be commanded that he give knowledge unto the disturber that he be ready at some short day, containing the space of fifteen days or three weeks (as the place happeneth to be near or far) for to show, if he can allege anything, wherefore the party that is disturbed ought not to present; and if he come not, or peradventure doth come and can allege nothing to bar the party of his presentation by reason of any deed made or written since the fine was made or inrolled, he shall recover his presentation with his damages."

This statute ends as follows:—"Where an advowson descendeth into parceners, though one present twice and usurpeth upon his co-heir, yet he that was negligent shall not be so clearly barred, but another time shall have his turn to present when it falleth" (c).

(a) *Windsor's case*, 5 Co. p. 102; Gibbs. p. 765.

(b) 5 Ves. p. 828.

(c) For the rest of this statute, vide *infra*, p. 341.

Lord Coke says that this statute extends as well to strangers of blood as to coparceners that are privy in blood; and if one of the parties, or his heirs, or any stranger usurp in the turn of another, the party wronged is not driven to his *quare impedit*; for it may be that the *quare impedit* or assise of *darrein presentment* may fail; and yet he may have remedy by this act; for albeit there be a plenarty by six months, yet the party may have a *scire facias* upon the roll or fine, and therein recover the presentation and damages (*d*).

In *The Bishop of Salisbury v. Phillips* (11 Will. 3), where two were seised in fee of the advowson in gross as joint-tenants, and by indenture agreed from thenceforth to be seised thereof as tenants in common, and not as joint-tenants, so as they and their respective heirs should present severally and by turns; Holt, chief justice, said, that a composition might be either by record, or by deed, or by parol: that after the first way, if one present, the other was not by an usurpation put to a *quare impedit*; that by the second way, the composition is good, and if it be once executed on all sides, he that brings a *quare impedit* need not mention the composition, which shows the very right and inheritance to be severed, and that a separate interest is vested in each to present alternately; that the third way, may be between parceners; but between strangers in blood composition cannot be without deed (*e*).

*Bishop of
Salisbury v.
Phillips.*

In *Amhurst v. Dawling*, the defendant having mortgaged the manor of Thundersley, to which an advowson was appendant, to the plaintiff, who brought the bill to foreclose, the church became void; the defendant moved the court for an injunction to stay the proceedings in a *quare impedit* brought by the plaintiff. By the court: Although the defendant Dawling hath no bill, yet being ready and offering to pay the principal, interest and costs, if the plaintiff will not accept his money, interest shall cease, and an injunction shall be to stay proceedings in the *quare impedit*; for the mortgagee can make no profit by presenting to the church, nor can account for any value in respect thereof, to sink or lessen his debt; and the mortgagee therefore in that case, until a foreclosure, is but in the nature of a trustee for the mortgagor (*f*).

Advowson in
the mort-
gagor.
*Amhurst v.
Dawling.*

In *Gally v. Selby* (7 Geo. 1), it was said to be "a rule in equity that though in the case of a mortgage in fee the legal right of presentation is vested in the mortgagee, yet they will interrupt that presentation and compel the ordinary to institute the clerk of the mortgagor any time before foreclosure: it not being any part of the profits of the estate" (*g*).

*Gally v.
Selby.*

In *Gardiner v. Griffith*, there was a covenant in the mortgage deed that on every avoidance of the church the mortgagee should

*Gardiner v.
Griffith.*

(*d*) 2 Inst. p. 361.

(*f*) 2 Vern. p. 401.

(*e*) Gibs. p. 764; 1 Salk. p. 43;
Carth. p. 505.

(*g*) 1 Stra. p. 403.

present. A bill in equity was brought against the mortgagee and his presentee seven months after institution, and the lord chancellor declared that as a *quare impedit* was confined to the six months after the death of the last incumbent, so the bill seeking to compel the defendant to resign, and consequently to deprive him of his living, ought by the same reason to be limited to the same time: had indeed a *quare impedit* been brought within the six months, and the bill been preferred after the six months, the court might, on a proper case, give directions in aid of the *quare impedit*, that the mortgage should not be given in evidence; but here there was no *quare impedit* brought, and the bill came out of time. Wherefore by the court: Dismiss the bill as to that part which seeks to compel the defendant to resign his living; but let the plaintiff redeem the mortgage on payment of principal, interest and costs (*h*). This decree was affirmed on appeal to the House of Lords (*i*).

*Mackenzie v.
Robinson.*

In *Mackenzie v. Robinson*, a petition was presented on behalf of a mortgagor, that the mortgagee of a naked advowson should accept of his nominee, and present him upon an avoidance, the incumbent being dead. On behalf of the mortgagee it was insisted, that as there was a large arrear of interest, he ought to present, if any advantage accrues from it. But Lord Chancellor Hardwicke was of opinion that the mortgagor ought to nominate: and that it is not presumed any pecuniary advantage is made of a presentation: and an order was made that the mortgagor should be at liberty to present, and the mortgagee was obliged to accept of the mortgagor's nominee (*k*).

*Attorney-
General v.
Hesketh.*

In *Attorney-General v. Hesketh* (*l*), the mortgagee of a manor and advowson was in possession when the mortgagor made a simoniacal presentation of A., who was rejected by the bishop. The mortgagor and mortgagee then joined in presenting B. C. got the title of the crown, and brought an information to remove the mortgagee's title, that it might not be set up at law, which the court decreed.

The mortgagee of an advowson appendant may pray a sale (*m*).

*Advowson in
bankrupt.*

Under the old bankruptcy law, although where a bankrupt is entitled to an advowson, or to a right of next presentation to a living, the commissioners might sell it, yet if the church was void at the time of the sale the bankrupt himself must present, though the sale of the advowson was good (*n*), because the void turn of a church is not valuable. For a sale made in such a case by the commissioners of the bankrupt's goods and chattels, was in order for the payment and satisfaction of his creditors and their just debts; but the void turn of a church is not a

(*h*) 2 P. Wms. p. 404; *S. C.* nom. *Gardiner v. Cook*, Mos. p. 16.

(*i*) See 3 Atk. p. 559.

(*k*) 3 Atk. p. 559.

(*l*) 2 Vern. p. 549; Ch. Pre. p. 214.

(*m*) *Robinson v. Jago*, Bunb. p. 130; Cas. t. Talb. p. 145.

(*n*) Gibs. p. 794.

matter valuable, which can go in discharge or satisfaction of such debts, though the advowson or next presentation, during the time the church is full, may be accounted to be so, and might be consequently granted or assigned by the commissioners (o).

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 44, it is provided that the property of a bankrupt divisible amongst his creditors, and in that act referred to as the property of the bankrupt, shall comprise the following particulars:—“(2) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy, or before his discharge, except the right of nomination to a vacant ecclesiastical benefice.”

It was said in *Arundel v. Bishop of Gloucester*, that where a manor with an advowson appendant was extended on statute merchant, if the church becomes void during the cognizee's estate, he might present to it. But it is supposed that if a case of this kind were now to happen, it would be governed by analogy to the case of a mortgagor (p).

The king is patron paramount of all the benefices in England. In virtue of which, the right and care of filling all such churches as are not regularly filled by other patrons, belongs to the crown, whether it happen through the neglect of others (as in the case of lapse), or through incapacity to present, as if the patron be attainted, or outlawed, or an alien, or have been guilty of simony or the like (q).

Upon which ground, the king has right to present to all dignities and benefices of the advowson of archbishoprics and bishoprics during the vacation of the respective sees. Not only to such as shall become void after the seizure of the temporalities, but to all such as shall become void after the death of the bishop, though before actual seizure. And because it is a maxim in law, that the church is not full against the king till induction; therefore, though the bishop has collated, or has presented, and the clerk is instituted upon that presentation, yet will not such collation or institution avail the clerk, but the right of presenting devolves to the king (r).

And it is said that this privilege which the king has of presenting by reason of temporalities of a bishopric being in his hands, shall be extended unto such preferments, to which the bishop of common right might present, though by his composition he has transferred his power unto others (s).

Upon promotion of any person to a bishopric, the king has a right to present to such benefices or dignities as the person was

46 & 47 Vict. c. 52.

Advowson on statute merchant.

By the king during the vacancy of a bishopric.

By the king on promotion to a bishopric.

(o) Wats. c. 11, p. 108; 3 Cruise, Dig. tit. xxi. p. 20.

(p) See 3 Cruise, Dig. ibid.

(q) Gibs. p. 763.

(r) Gibs. p. 763; Wats. c. 9, p. 73; 1 Inst. p. 328 a.

(s) Wats. c. 1, p. 73; 2 Roll. Abr. p. 343.

possessed of before such promotion, though the advowson belongs to a common person. This right, however, must be exercised in the lifetime of the person promoted, otherwise the king's turn is lost (*t*). This right of presenting upon promotion by the king, as making the avoidance which would not otherwise happen, did spring from the practice of the popes, and is now an uncontested right of the crown, and has been established not only by long practice, but by many judgments upon full and solemn hearings; and that, whether the churches are new or old, and how often soever this happens successively by promotions to bishoprics from the same benefice or dignity, as was adjudged in the case of St. Martin's and St. James' (*u*).

Prerogative presentations not turns.

At one time it was said that this right of the crown to present upon promotion defeats the right of any grantee, who had the next avoidance, for his right was only to the next; and the next he cannot have, and therefore can have none (*x*). But this was denied in *Grocers' Comp. v. Archbishop of Canterbury*, where De Grey, C. J. says, that prerogative presentations cannot be considered as turns; and therefore a vacancy, the fifth in fact, was decided to be a third turn with regard to the patron whose turn it was to present, it being, in truth, the third avoidance of which he could take advantage (*y*). And the same point was decided in favour of the grantee of a next avoidance, in *Calland v. Troward*, and affirmed on a writ of error (*z*).

By the old law in Ireland no person could accept a bishopric there until he had resigned all the preferments which he had in England, which preferments being void before the acceptance of the bishopric, it seems that the king in such a case would lose the presentation.

Colonial bishopric.

In the important case of *Regina v. The Provost and College of Eton*, decided by the Queen's Bench in 1857, it was ruled that the promotion of a clerk in possession of a living in the gift of Eton college to the bishopric of Christchurch in New Zealand, did not give the crown the right of appointing the successor to the vacant living (*a*).

25 Edw. 3, st. 6, c. 1.
By the king in prejudice of another's right.

By 25 Edw. 3, st. 6, c. 1, "And as touching presentments to be made by our lord the king, or any of his heirs, to a benefice of holy church in another's right by old title; our said lord the king, to the honour of God and holy church, willeth and granteth of the assent of the said parliament, that from

(*t*) *Armagh (Archb.) v. Att.-Gen.* 3 Bro. P. C. p. 514, note.

(*u*) See *Wentworth v. Wright*, Cro. Eliz. p. 527, and *Woodley v. Bp. of Exeter*, Cro. Jac. p. 691, where the matter was doubted and argued; and *Rex v. Bp. of London*, 3 Lev. p. 382, 1 Ld. Raym. p. 23, where it was decided. The arguments of counsel are given at length in 1 Show. pp. 413, 441. See also *Gibs.* p.

763, where the question of the effect of a *commendam* is discussed.

(*x*) *Gibs.* pp. 758, 763; *Woodley v. Bp. of Exeter*, Cro. Jac. p. 691.

(*y*) 3 Wils. p. 214; *Black. W.* p. 770.

(*z*) 2 *Black. H.* p. 324; 6 T. R. p. 439. See also 3 Wils. pp. 214, 221.

(*a*) 8 E. & B. p. 610; 4 Jur., N. S. p. 335; 27 L. J., Q. B. p. 132.

henceforth he nor any of his heirs shall not take title to present to any benefice in any other's right of any time of his progenitors; nor that any prelate of his realm be bound to receive any such presentment to be made, nor to do thereof any execution; nor that any justice of the one place or the other, may not nor ought not to hold plea, or give judgment upon any such presentment to be made; but that the said king and his heirs be for ever hereafter clearly barred of all such presentments; saving always to him and his heirs all such presentments in another's right fallen or to fall, of all his time, and of the time to come."

And by 25 Edw. 3, st. 6, c. 3, "Whereas before this time our lord the king hath taken title to present to benefices at the suggestion of many clerks, where the title hath not been true, and by such presentments and judgments thereupon given, the clerks have been received by the ordinaries of the places, against God and good faith, and in depression of them which had good and true title to the said benefices; now the king willet and granteth, that at what time he shall take collation or presentment from henceforth to any benefice in another's right, that the title whereupon he groundeth himself shall be well examined that it be true; and at what time before judgment the title be found by good information untrue or unjust, the collation or presentment thereof made, shall be repealed; and the patron or the possessor, which shall show and prove the false title shall have thereupon writs out of the chancery as many as to him shall be needful."

25 Edw. 3,
st. 6, c. 3.

And by 13 Ric. 2, st. 1, c. 1, reciting the last statute, and that notwithstanding the same some of the king's presentees, by favour of the ordinaries be instituted and inducted in benefices of holy church without due process, the parties not warned nor called, and sometime taken by false inquests favourably, and the incumbents in such manner put out; it is ordained, that the said statute be firmly holden and kept. "And moreover our lord the king, for the reverence of God and holy church, doth will and grant, that if he present to any benefice that is full of any incumbent, the presentee of the king shall not be received by the ordinary to the benefice, till the king hath recovered his presentment by process of the law in his own court. And if any presentee of the king be otherwise received, and the incumbent put out without due process, as afore is said, the said incumbent shall begin his suit within a year after the induction of the king's presentee at the least."

13 Ric. 2,
st. 1, c. 1.

This limit of time was done away with by the later statute,

22 Hen. 4, c. 22.

22 Hen. 4,
c. 22.

In a *quare impedit*, where the bishop of Derry claimed the right of patronage of a living in the county of Londonderry, which was within the diocese of Derry, a surrender made by a former bishop to the crown, of all the livings in that county, was tendered in evidence. This surrender was coupled with a grant by the crown, dated two days afterwards, of the livings which

Grant by
Crown.

had been so surrendered. Taken together, these documents were held to be admissible in evidence; and as the grant recited that all the livings in the county had anciently belonged to the see, such evidence was, for the purpose of proving the title of the bishop, received as an admission by the crown of that fact.

The value of such evidence was still open to dispute.

Before the date of the grant, the crown had entered into articles of agreement with persons, now represented by the governor and assistants of the Irish Society, to grant to them the livings in the county of which the living in question was named as one; it was holden, that this agreement did not prevent the grant from being receivable in evidence, however its value might be thereby affected.

Two letters from the crown to two successive bishops of Derry, directing them to perform the covenants and directions contained in the grant, were tendered in evidence as recognitions by the crown of its previous grant; and it was holden, that they were admissible for this purpose (*b*).

By the lord
chancellor, of
certain
benefices in
the king's
gift.

The lord chancellor, or lord keeper of the great seal for the time being, has the right to present to the benefices appertaining to the king, under a certain yearly value in the king's books (*c*).

Which privilege is said to have been given to the lord chancellor, upon consideration that he had many clergymen constantly officiating under him, as those did who were long called clerks of the chancery, and were heretofore persons in holy orders (*d*).

The foundation of which right will be best understood by what was anciently declared in parliament upon that head, in the rolls of parliament, in the fourth year of Edw. 3. "Because it hath been ordained in times whereof there is no memory, and granted by the progenitors of our lord the king, that the chancellors for the time being should give the benefices (which belong to the king) to give, taxed at twenty marks and under, to the clerks of the chancery which have long laboured in the place; which thing hath been used from the said time, till the bishop of Lincoln was made chancellor, who in all his time gave the said benefices to his own clerks, and to other clerks, against the will of our lord the king, and against the ordinance and usage aforesaid: May it please our said lord the king, and his council to ordain, that the chancellors which shall be for the time, doe give the benefices which belong to them to give for the cause aforesaid, to the clerks of the said place, as it hath been anciently used, and that this be done by election of the masters of the chancery. Answer: Let this bill be delivered to the king, and it liketh the council, that it is fit to command the chancellor, that hereafter he give such benefices to the king's clerks of the

(*b*) *Irish Society v. The Bp. of Derry*, 12 Cl. & F. p. 642 (1845).

(*c*) *Gibs.* p. 763.

(*d*) *Johns.* p. 33.

chancery, the exchequer, and of both benches, and not to others," (e).

Here we see that the privilege extended only to benefices of twenty marks or under; but now it is enlarged to all benefices of 20*l.* or under, which enlargement was probably made about the time of the new valuation taken in the reign of King Henry VIII. (f).

And it has been declared, that where the chancellor presented to a benefice above that value, and the clerk was instituted and inducted, and another obtained a presentation from the king, the first clerk could not be removed by the law; because the presentation was under the great seal, and therefore by the king (in law), being in his name. But if the presentation had recited (as is there intimated it ought to have done), that the benefice was under the value of 20*l.*, it had been void; because it would have appeared upon record in the office of first fruits, that the chancellor was deceived: or, if the mistake had appeared before induction, the king might have revoked it (g).

But whereas it has been said (h) that the king if he please may present to such livings under the value of 20*l.*; it is to be observed, that the claim of the lord chancellor or lord keeper for the time being is very ancient; and that nothing appears to have been ever determined or moved, in a judicial way, to the diminution of that ancient right. On the contrary, there is an old writ in the register, which supposes the right to be in him, namely, the writ *de primo beneficio ecclesiastico habendo*; by which the king requires the chancellor to grant to a particular person the first benefice that shall fall in the gift of the crown which he will accept; and the language of the writ is, *Volumus quod idem A. ad primum beneficium ecclesiasticum (taxationem viginti marcarum excedens) vacaturum, quod ad presentationem nostram pertinuerit, et quod duxerit acceptandum, presentetur* (i).

In 1863 an act (26 & 27 Vict. c. 120) was passed for enabling the lord chancellor to sell certain advowsons in his gift for the purpose of augmenting the income of benefices. The act relates to two sets of cases: (A) the selling of divers advowsons on the terms that the purchase-money shall be applied in augmenting the living whose advowson is thus sold; and (B) the sale of other advowsons, under restrictions, and the augmenting with the purchase-money yet other livings in the gift of the lord chancellor. The provisions of the act are as follows (A):—

Sect. 1. "It shall be lawful for the lord chancellor to sell and convey the advowsons of the several livings included in the first schedule to this act in the manner, for the considerations, and subject to the regulations hereinafter contained."

Power to lord chancellor to sell advowsons in first schedule.

(e) Gibs. p. 764.

(h) Wats. c. 9, p. 76.

(f) Ibid.

(i) Gibs. p. 764; Christian's note

(g) Ibid.; Lord Chancellor's case, Hob. p. 214.

to 3 Black. Com. p. 48.

and exempt the lord chancellor from any necessity of selling to the highest bidder.

Power to lord chancellor to require from incumbents a return of income and outgoings.

Sect. 4. "It shall be lawful for the lord chancellor from time to time to require from the incumbents of the advowsons mentioned in the first schedule to this act, and every such incumbent receiving such requisition is hereby required to make to the lord chancellor, a return or statement in writing according to the best of his knowledge, information, or belief, and in such form as shall be prescribed by the lord chancellor, of the gross income or yearly benefit of his benefice, any tithe rentcharge therein being returned at par, and also a similar return of all rates, taxes, tenths, dues, and other outgoings, including the charges of collection, but not including income or property tax, which shall have been paid by or chargeable on such incumbent in respect of his benefice during the five years immediately preceding Lady Day, 1863, distinguishing the various items in respect of which such income and outgoings may have arisen.

"If the incumbent has a curate, the stipend of the curate must be stated, and the reasons for his appointment.

"Where there is no parsonage or residence for the incumbent belonging to the living, a sum of 25*l.* per annum shall be deducted from the net yearly value as returned by the incumbent.

"If at the time of making any such return as is hereby required to be made by incumbents a living shall be subject to a charge of annual payments in respect of monies borrowed for building or rebuilding the parsonage or other buildings, or for drainage or other improvements of the glebe or lands of the living, no deduction shall be made from the net yearly value in respect of such annual payments, but a separate statement shall be made by the incumbent of the number and amount of the annual payments remaining to be made."

Purchasers may pay the money into the bank, or in other modes, with consent of lord chancellor.

Sect. 5. "When the purchase-money for any advowson to be sold under this act has been agreed upon, the purchaser may, with consent of the lord chancellor, pay or satisfy the same in any one of the following modes: (that is to say,)

First. He may pay the whole of the purchase-money into the Bank of England to the credit of the ecclesiastical commissioners for England to an account entitled The Lord Chancellor's Augmentation Fund Account, No. 1:

Secondly. He may pay one-half of the purchase-money into the Bank of England to the credit and account aforesaid, and may give security, to the satisfaction of the lord chancellor, for payment in manner aforesaid, when and so soon as the living shall be vacant, of such sum of money as shall be equal to the sum which the other half of the purchase-money would produce if it were duly accumulated, with compound interest at four per centum per annum between the time appointed for the completion of the purchase and the next avoidance of the living:

Thirdly. The purchaser may grant and secure to the satisfac-

tion of the lord chancellor such a present annuity or rentcharge in perpetuity, or may convey tithe rentcharges arising within the parish of such net yearly value, estimated as aforesaid, as shall be equal to five per centum per annum upon one-half of the said purchase-money of the said advowson; and the purchaser may also grant and secure as aforesaid such further annuity or rentcharge, to arise and be payable in perpetuity upon the next avoidance of the living, as shall be equal to five per centum per annum upon such sum as would have been produced if the remaining moiety of the purchase-money had been accumulated at compound interest at four per centum per annum between the time when such purchase-money became payable and the time of the avoidance of the living:

Fourthly. The purchaser may grant and secure as aforesaid such annuity or rentcharge as aforesaid at five per centum per annum, or may convey such tithe rentcharges as aforesaid, in satisfaction and discharge of the first moiety of the purchase-money, and may secure the other moiety of the purchase-money, with accumulated interest and compound interest thereon at the rate of four per centum per annum in manner aforesaid, to be paid on the next avoidance of the living in the manner hereinbefore directed:

Fifthly. It shall be lawful for the lord chancellor at his discretion to accept in satisfaction of the whole or any part of the purchase-money for an advowson any freehold land which may be conveniently and beneficially held by the incumbent; the value of such land, and the title thereto, shall be ascertained in such manner as the lord chancellor shall direct, and all the expenses attending the same, and the conveyance of the land, shall be defrayed by the purchaser of the advowson."

Sect. 6. "When any sum of purchase-money shall have been paid into the Bank of England in pursuance of this act, the same may be applied under the direction of the lord chancellor in manner following:—

Purchase-money may be applied under direction of lord chancellor.

Any sum not exceeding one half the purchase-money for the advowson may be paid by order of the lord chancellor to the ecclesiastical commissioners for England, who, if required by the lord chancellor, shall in respect thereof grant an annuity, and charge the same upon their common fund at the rate of 3*l.* 10*s.* per centum per annum on the sum so paid, which annuity shall be forthwith applied in augmentation of the income of the living:

And as to the residue of such purchase-money, the same may by order of the lord chancellor be paid over to the ecclesiastical commissioners for England, upon the terms that such commissioners shall on the next avoidance of the living grant in augmentation thereof, and secure upon their common fund, such an annuity as would be equal to three

and a half per centum upon such sum of money as the residue of the purchase-money so paid over as aforesaid would have amounted to or produced if the same had been accumulated with compound interest at three and a half per centum between the day of such payment and the day of the avoidance of the said living."

Annuities or
rentcharges
may be
purchased.

Sect. 7. "It shall be lawful for the lord chancellor to direct that any part of the purchase-money so paid into the bank as aforesaid may at any time, as occasion shall offer, be applied in the purchase of any freehold land which may be conveniently and beneficially held by the incumbent, or of any tithe rentcharge or of an annuity or rentcharge at the rate of four per centum, to be issuing out of or secured on freehold or copyhold tenements or hereditaments in England, or in the purchase of a deferred annuity or rentcharge issuing or secured as aforesaid, to arise and become payable on the next avoidance of the living, provided that such deferred annuity be not less than four per centum on the sum which the purchase-money would have amounted to if accumulated at compound interest at four per centum between the time of such purchase and the next avoidance of the living."

Parsonage
houses may
be built out
of purchase-
money.

Sect. 8. "Provided always, that it shall be lawful for the lord chancellor to direct that part of the purchase-money of any advowson, but not exceeding in any case 500*l.*, may be applied or paid for the purpose of purchasing, building, or rebuilding a parsonage house on the said living, provided an equal sum be found and paid for the same purpose by or on behalf of the incumbent or owner of the advowson."

What propor-
tion may be
applied to
augmentation
of living.

Sect. 9. "Any sum not exceeding one moiety of the purchase-money or consideration given for the purchase of an advowson shall be applied in the immediate augmentation of the living, and if the other moiety of the purchase-money or consideration does not fall under some of the provisions hereinbefore contained, the same shall be accumulated at compound interest in such manner as the lord chancellor shall direct."

Inquiry as to
title and the
sufficiency of
value of
proposed
security.

Sect. 10. "If on the purchase of any of the said advowsons it shall be agreed that the purchaser shall grant an annuity or give security for part of the purchase-money, or if the lord chancellor shall direct the purchase of any annuity or rentcharge as aforesaid, or the purchase of any freehold land as aforesaid, the title of the purchaser to the property proposed as security, and the sufficiency in value of such property, and the title of the vendor of any annuity or rentcharge or freehold land to be purchased as aforesaid, may be referred by order of the lord chancellor to the registrar of the title to landed estates, who shall cause such title to be investigated, and inquire into the sufficiency of the proposed security, and report thereon to the lord chancellor."

Forms of
conveyances,
&c.

Sects. 11, 12, 13 provide that conveyances, grants of annuities, and mortgages may be made according to certain forms given in the second schedule to the act.

Sects. 14, 15, 16 provide for the security on which annuities may be granted, and that the annuities shall be payable half-yearly, and shall be apportioned between the outgoing and incoming incumbent on a vacancy.

Sect. 17. "Any annuity granted under this act, if charged upon real or copyhold estates, shall be recoverable in the same manner in which tithe rentcharges are recoverable, or by petition in chancery, with power for the court to appoint a receiver."

Recovery of annuity.

Sect. 19. "Any person entitled under any settlement at law or equity for his own benefit to the possession or receipt of the rents and profit of land for the term of his own life or in tail shall, for the purposes of this act, be deemed to be absolute owner of that land; and any annuity or rentcharge granted by such tenant for life or in tail in the purchase of an advowson under this act, with consent of the person entitled to the next vested estate of inheritance, or, if a minor, with consent of his guardian lawfully appointed for such purpose, shall be well charged on the estates of all the persons claiming under such settlement; but any advowson purchased by such owner shall be deemed to be held on trust for the persons entitled under the settlement, in the same manner as if there had been contained in the settlement a power to sell the land comprised in the settlement, or a portion thereof, and to apply the monies arising therefrom in the purchase of an advowson, to be settled on the same trusts as the land sold, and such purchase had been made accordingly."

Power for limited owners to purchase.

The provisions which would come under the head (B) above mentioned are—

Sect. 23. "Any person who is tenant in tail or in fee, either in possession, remainder, or reversion, of any freehold or copyhold lands situate within the limits of any living in the gift of the lord chancellor, whether included or not in the first schedule hereto, the clear annual value of which, to be ascertained as aforesaid, is not less than 200*l.* per annum, nor more than 500*l.* per annum, may apply to the lord chancellor for the purchase of the advowson of such living; and it shall be lawful for the lord chancellor to sell and convey the advowson of such living to the applicant, either absolutely, or to the uses or upon the trusts of any settlement of such lands."

Tenant in tail or in fee of lands within the limits of certain livings may apply for the purchase of the advowson.

Sect. 24. "Provided, that the total number of the livings to be disposed of under the last hereinbefore-mentioned power shall not exceed one hundred, nor shall any advowson be sold under the same power for a less sum than 10 years' purchase of the clear annual value of the living, to be ascertained as aforesaid, nor for a sum which shall not be certified by the ecclesiastical commissioners to be reasonable and adequate, regard being had to the age of the incumbent at the time of sale."

Proviso as to number of livings to be sold under amount herein named, &c.

Sect. 25. "The purchase-money of all such last-mentioned livings shall be paid to the ecclesiastical commissioners to the credit of a distinct account, to be called The Lord Chancellor's

Purchase-money for such livings to be paid to

ecclesiastical commissioners to credit of a distinct account.

Augmentation Account, No. 2; and the money, when so paid in, shall, unless the lord chancellor shall otherwise direct, be immediately laid out in the purchase of three per cent. reduced bank annuities, and the dividends thereof shall be in like manner duly invested and accumulated at compound interest by the ecclesiastical commissioners, until the lord chancellor shall make any order for the application of such purchase-money, or of the funds so produced by the investment thereof."

Lord chancellor may augment benefices in his gift.

Sect. 26. "It shall be lawful for the lord chancellor, at his discretion, to augment any benefice in his gift to such an amount as he may think fit, and for the purpose of such augmentation to exercise over the funds lastly hereinbefore mentioned all such powers as the ecclesiastical commissioners are or may be by law authorized to exercise over the common fund at their disposal: Provided that no such benefice shall, with the augmentation, amount to an annual value of more than 400*l.*, nor to an annual value exceeding 1*l.* sterling for every four inhabitants within the limits thereof."

Proviso as to such augmentation.

How annual value is to be ascertained.

Sect. 27. "In all cases the annual value shall be ascertained in the manner hereinbefore directed, and the number of inhabitants within the limits of any living shall be determined by a reference to the last preceding census."

General provisions.

The following provisions appear to relate to all cases under this act:—

By sect. 18, the purchaser of an advowson under the act shall have an indefeasible title.

By sect. 20, any person or body of persons, whether corporate or not, entitled to hold advowsons and to present to benefices, may purchase and hold advowsons under this act, notwithstanding the law of mortmain. But no such person or body shall hold more than four advowsons (unless taken by descent).

Purchaser of advowson under this act not to resell for five years.

Sect. 21. "It shall not be lawful for the purchaser or grantee of any advowson under this act to sell or contract for the sale of the same, or of the next presentation to the benefice, to any purchaser or purchasers thereof, until after the expiration of five years next following the date of the sale or grant to such purchaser or grantee; but this proviso shall not extend to prevent any such sale or contract for sale within such prohibited period by the heirs, devisees, executors, administrators or assignees in bankruptcy of such purchaser or grantee" (*k*).

By sect. 22, if any question arise on any contract touching the construction or application of the act, the lord chancellor may direct it to be argued before himself or any other chancery judge, and the decision thereon shall be final.

Sects. 28, 29, 30 make provision as to fees and expenses.

By whom business to be transacted.

Sect. 31. "The business to be transacted under this act shall be managed by the lord chancellor's secretary of presentations, under the superintendence and control of the lord chancellor."

(*k*) See *Welch v. Bp. of Peterborough*, 15 Q. B. D. p. 432.

Sect. 32. "A return shall be laid before parliament within fourteen days after the commencement of each session of all sales that shall have been effected under the powers of this act, and of the terms on which such sales have been effected, and of all monies received under the authority of this act and of the application thereof."

Returns to be made to parliament.

Sect. 33. "The lord chancellor shall have authority to make from time to time general orders for regulating all proceedings under this act, and such orders shall be laid before parliament within fourteen days after the same are made, if parliament be then sitting, and if not, within fourteen days after the next session of parliament has commenced."

Lord Chancellor to make general orders for regulating proceedings.

Sect. 34. "The lord chancellor shall not incur or be subject to any personal liability, nor shall he be made a party to any proceeding at law or in equity, by reason or in consequence of anything done under the provisions of this act; and if any dispute, doubt or difficulty whatever shall arise with respect to any sale, contract or agreement under this act before the completion thereof, it shall be lawful for the lord chancellor by writing under his hand to annul and determine such sale, contract or agreement, and the same shall thenceforth be void and of no effect."

Lord chancellor not to incur personal liability, &c. in respect of proceedings under this act.

Sect. 35. "The provisions of 'The Lands Clauses Consolidation Act, 1845,' 'with respect to the purchase of lands by agreement,' 'with respect to the purchase-money or compensation coming to parties having limited interests, or prevented from treating, or not making title,' and all other provisions of the said act applicable to and in the case of the purchase of lands by agreement, shall be applicable to the purchase of the tithe rent-charge arising within the parish under this act."

Provisions of 8 & 9 Vict. c. 18, to apply to this act.

The act contains in the first schedule a long list of livings to which the powers before headed (A) apply. There is no schedule of the livings subject to the powers headed (B).

It is not necessary to refer to the pope's presentation to benefices before the reformation statutes, or to the provisions in the earlier statutes restraining those presentations. It will be enough to say that these provisions are contained in 25 Edw. 3, st. 4; 38 Edw. 3, st. 2; 3 Ric. 2, c. 3; 7 Ric. 2, c. 12; 12 Ric. 2, c. 15; 13 Ric. 2, st. 2, cc. 2, 3; and 16 Ric. 2, c. 5.

Pope's former powers of presenting to benefices.

The present law as to presentations by papists is as follows:— By 3 Jac. 1, c. 5, s. 13, "Every person, being a popish recusant convict, shall be utterly disabled to present to any benefice with cure or without cure, prebend or any other ecclesiastical living; or to collate or nominate to any free school, hospital or donative, or to grant any avoidance of any benefice, prebend or other ecclesiastical living."

Papists shall not present to benefices, and provisions where benefices in patronage of papists become void.

"And the chancellor and scholars of the University of Oxford, so often as any of them shall be void, shall have the presentation, nomination, collation and donation of and to every such benefice, prebend or ecclesiastical living, school, hospital and donative set lying and being in the counties of Oxford, Kent, Middlesex,

3 Jac. 1, c. 5.

Sussex, Surry, Hampshire, Berkshire, Buckinghamshire, Gloucestershire, Worcestershire, Staffordshire, Warwickshire, Wiltshire, Somersetshire, Devonshire, Cornwall, Dorsetshire, Herefordshire, Northamptonshire, Pembrokeshire, Caermarthenshire, Brecknockshire, Monmouthshire, Cardiganshire, Montgomeryshire, the city of London, and in every city and town being a county of itself lying and being within any of the limits and precincts of any of the counties aforesaid, or in or within any of them as shall happen to be void during such time as the patron thereof shall be and remain a recusant convict as aforesaid."

"And the chancellor and scholars of the University of Cambridge shall have the presentation, nomination, collation and donation of and to every such benefice, prebend, or ecclesiastical living, school, hospital and donative, set lying and being within the counties of Essex, Hertfordshire, Bedfordshire, Cambridge-shire, Huntingdonshire, Suffolk, Norfolk, Lincolnshire, Rutlandshire, Leicestershire, Derbyshire, Nottinghamshire, Shropshire, Cheshire, Lancashire, Yorkshire, the county of Durham, Northumberland, Cumberland, Westmoreland, Radnorshire, Denbighshire, Flintshire, Carnarvonshire, Angleseyshire, Merionethshire, Glamorganshire, and in every city and town being a county of itself lying within any of the limits and precincts of any of the said counties, or in or within any of them as shall happen to be void during such time as the patron thereof shall be and remain a recusant convict as aforesaid."

"Provided, that neither of the said chancellors nor scholars of either of the said universities shall present or nominate to any benefice with cure, prebend, or other ecclesiastical living, any such person as shall then have any other benefice with cure of souls; and if any such presentation or nomination shall be made of any such person so beneficed, the said presentation or nomination shall be utterly void."

Being a Popish Recusant convict.—And this whether he be convicted before the avoidance or after; for the words are general, that the university shall present so often as any such benefices shall be void; and avoidances before conviction are within the same mischief as avoidances after; and it would be a hard construction that general words shall not be extended to remedy all cases which are within equal mischief (*l*).

Shall be utterly disabled.—They were utterly disabled before, by being made excommunicate, in sect. 2, as was observed by Finch, solicitor, in the case of *Knight v. Dauncer*; and therefore, of what force soever institution or induction, when given upon such a presentation, may be against strangers, there is no doubt but the bishop may refuse to give it, and take the benefit of the lapse, in case no other presents who hath right, and is capable of presenting. For that the bishop in this case, as in others,

(*l*) *Fitzherbert v. Chancellor and Scholars of the Univ. of Oxford*, 1 Com. p. 182; Gibs. p. 771.

hath right to lapse, appears from hence, that the statute intended no more than to put the universities in the place of the patron, all rights which belong to others remaining as they were before (*m*).

To present.]—Hereby the patron is only disabled to present; and he continues patron as to all other purposes; and therefore he shall confirm the leases of the incumbent (*n*).

Or to grant an Avoidance.]—But such person, by being disabled to grant an avoidance, is no way hindered from granting the advowson itself in fee, or for life or years *bonâ fide* and for good consideration (*o*).

And the Chancellor and Scholars.]—The two clauses which give this benefit to the universities respectively, are private clauses, whereof the judges, without pleading of them, cannot take notice (*p*).

So often as any of them shall be void.]—But if an advowson or avoidance, belonging to such a person, come into the king's hands, by reason of an outlawry, or conviction of recusancy, or the like, the king, and not the university, shall present (*q*).

During such Time as the Patron thereof shall be a Recusant convict.]—When the presentation for that turn is vested in the university, although afterwards the recusant conforms himself, or dies, yet the university shall present (*r*).

By 1 Will. & Mar. c. 26, s. 2, it is enacted in substance (*s*) as follows: Where any person shall be seised or possessed of any advowson, right of presentation, collation or nomination to any such ecclesiastical living, free school, or hospital, as aforesaid, in trust for any papist or popish recusant, who shall be convicted or disabled, as by the 3 Jac. 1, c. 5, or by this act, he shall be disabled to present, nominate, or collate to any such ecclesiastical living, free school or hospital, or to grant any avoidance thereof, and such presentations, nominations, collations, and grants shall be void; and the universities shall proceed as if such recusant convict or disabled were seised or possessed thereof.

And if any trustee or mortgagee, or grantee of any avoidance shall present, nominate, or collate, or cause to be presented, nominated, or collated, any person to any such ecclesiastical living, free school or hospital whereof the trust shall be for any recusant convict or disabled, without giving notice of the avoidance in writing to the vice-chancellor within three months next after the avoidance, he shall forfeit 500*l.* to the respective chancellor and scholars of the university to whom the presentation, nomination or collation shall belong.

(*m*) Gibs. p. 771.

(*n*) 1 Hawk. p. 402.

(*o*) Ibid.

(*p*) The case of *The Chancellor, Masters, and Scholars of the Univ. of Oxford*, 10 Co. p. 57.

(*q*) 1 Hawk. p. 402.

(*r*) 10 Co. p. 57, cited above.

(*s*) The verbiage of this and the two following acts on the same subject, is very florid; and the omitted passages do not seem to alter the sense.

Provided, that the said chancellors and scholars of either university shall not present or nominate to any benefice with cure, prebend or other ecclesiastical living, any person as shall then have any other benefice with cure of souls; and if any such presentment shall be had or made of any such person so beneficed, the same shall be utterly void (*t*).

Refuse or forbear.]—In the case of *Fitzherbert v. The University of Oxford*, the party was summoned to take the oaths, but refused to attend. Upon which occasion it was declared by the court, that the justices of the peace ought to be present at the time appointed, and if they are not there, it is a good excuse for the party, if the party attends, but there is no necessity that they should be present if the party does not come; it is sufficient if they leave notice at the place to give them notice if the party comes; and the party himself is obliged to do the first act, namely, to attend at the time and place appointed (*u*).

13 Anne,
c. 13.

And by 13 Anne, c. 13, s. 1, it is further enacted, in substance, That every papist or person making profession of the popish religion, and every child of such person not being a protestant under the age of twenty-one years, and every mortgagee, trustee or person, any way intrusted, directly or indirectly, mediately or immediately, by or for such papist or person making profession of the popish religion or such child as aforesaid, whether such trust be declared by writing or not, shall be disabled to present, collate and nominate to any benefice, prebend or ecclesiastical living, school, hospital or donative, or to grant any avoidance of any benefice, prebend or ecclesiastical living, and every presentment, collation, nomination and grant, and every admission, institution and induction thereupon, shall be void; and the universities shall have the presentation, nomination, collation and donation.

Sect. 2. And when any presentation to any benefice or ecclesiastical living shall be brought to any archbishop, bishop or other ordinary, from any person who shall be reputed to be, or whom such archbishop, bishop or other ordinary shall have cause to suspect to be a papist or trustee of any person making profession of the popish religion, or suspected to be such, such archbishop, bishop or other ordinary shall tender or administer to every such person (if present) the declaration against transubstantiation of the 25 Car. 2, c. 2, and if absent, shall by notice in writing to be left at the place of habitation of such person, appoint some convenient time and place when and where such person shall appear before such archbishop, bishop or other ordinary, or some persons to be authorized by them, by commission under their seal of office, who shall, upon such appearance, tender or administer the said declaration to the party making such presentation; and if he shall neglect or refuse to make and subscribe the declaration so tendered, or shall neglect or refuse

(*t*) The residue of this section was s. 1.
repealed by 32 & 33 Vict. c. 109, (*u*) Com. p. 183.

to appear upon such notice, such presentation shall be void ; and in such case the archbishop, bishop or other ordinary shall, within ten days after such neglect or refusal, send and give a certificate under their seal of office, of such neglect or refusal to the vice-chancellor ; and the presentation to such benefice, for that turn only, shall be vested in the respective chancellor and scholars.

Sect. 3. And for the better discovery of secret trusts and fraudulent conveyances made by papists, it is enacted, that when the presentation of any person presented to any benefice or ecclesiastical living, shall be brought to any archbishop, bishop, or other ordinary, he shall, before he give institution, examine the person presented upon oath, whether to the best and utmost of his knowledge and belief, the person who made such presentation be the true and real patron, or made the same in his own right, or whether he be not mediately or immediately, directly or indirectly, trustee or any way intrusted for some other, and whom by name, who is a papist or maketh profession of the popish religion, or the children of such, or for any other and whom, or what he knows, has heard, or believes touching the same, and if such person so presented shall refuse to be examined, or shall not answer directly, the presentation shall be void.

Sect. 4. And the chancellors and scholars of the respective universities, to whom the presentation to such benefices and ecclesiastical livings shall belong, in case the rightful patrons had been popish recusants convict, and their presentees or clerks, may, for the better discovery of such secret and fraudulent trusts, exhibit their bill in any court of equity, against such person presenting, and such person as they have reason to believe to be the *cestui que trust* of the advowson, or any other person whom they have cause to suspect may be able to make any other or further discovery of such secret trust and practices, to which bill the defendants, being duly served with process of the court, shall forthwith directly answer ; and if they shall refuse or neglect to answer, in such time as shall be appointed by the court, the bill shall be taken *pro confesso*, and be allowed as evidence against such person so neglecting and refusing, and his trustees, and his or their clerk ; provided that every person having fully answered such bill, and not knowing of any such trust, shall be entitled to his costs to be taxed according to the course of the court.

Sect. 5. And the court where any *quare impedit* shall be depending, at the instance of the said chancellor and scholars, or their clerk, being plaintiffs or defendants in such suit, by motion in open court, may make a rule or order requiring satisfaction upon the oath of such patron and his clerk, who in the said suit shall contest the right of the university to present, by examination of them in open court, or by commission under the seal of such court for the examination of them, or by affidavit as the said court shall find most proper, in order to the discovery of any secret trusts, frauds or practices relating to the said pre-

sentation; and if it appear to the court, upon the examination of such patron or clerk, that the said patron is but a trustee, then they shall discover who the person is and where he lives, and upon their refusal to make such discovery, or to give satisfaction as aforesaid, they shall be punished as guilty of a contempt of the court; and if the said patron or his clerk shall discover the person for whom the said patron is a trustee, then the court, on a motion made in open court, shall make a rule or order, that the person for whom the patron is a trustee, shall, in the said court, or before commissioners to be appointed for that purpose under the seal of the said court, make and subscribe the declaration against transubstantiation of the 25 Car. 2, c. 2, and likewise, on pain of incurring a contempt of the said court, shall give such further satisfaction upon oath relating to the said trust as the court shall think fit; and such person so required to make and subscribe the said declaration, and refusing or neglecting so to do, shall be esteemed as a popish recusant convict in respect of such presentation.

Sect. 6. And the answer of such patron and the person for whom he is intrusted, and his and their clerk or any of them, and their examinations and affidavits taken as aforesaid by order of any court where such *quare impedit* shall be depending, or by any archbishop, bishop or other ordinary, or the commissioners as aforesaid, which examinations shall therefore be reduced into writing and signed by the party examined, shall be allowed as evidence against such patron so presenting and his clerk.

Sect. 7. Provided, that no such bill, nor any discovery to be made by any answer thereunto, or to any such examination as aforesaid, shall be made use of to subject any person making such discovery or not answering such bill, to any penalty or forfeiture, other than the loss of the presentation then in question.

Sect. 8. And in case of any such bill of discovery exhibited by the chancellor and scholars or their presentee, no lapse shall incur, nor plenarty be a bar against them, in respect of the benefice or ecclesiastical living touching which such bill shall be exhibited, till after three months from the time that the answer to such bill shall be put in, or the same be taken *pro confesso*, or the prosecution thereof deserted, provided that such bill be exhibited before any lapse incurred.

Sect. 9. And the chancellor and scholars may sue a writ of *quare impedit* by the name of chancellor and scholars, or by their proper names of incorporation at their election.

Sect. 10. And in case of any such trust confessed or discovered by any answer to such bill or such examination as aforesaid, the court may enforce the producing of the deeds relating to the said trusts, by such methods as they shall find proper.

11 Geo. 2,
c. 17.

And by 11 Geo. 2, c. 17, s. 5, it is further enacted, in substance,

That every grant to be made of any advowson or right of presentation, collation, nomination or donation of and to

any benefice, prebend or ecclesiastical living, school, hospital or donative and every grant of any avoidance thereof, by any papist or person making profession of the popish religion, whether such trust be declared by writing or not, shall be null and void, unless such grant be made *bonâ fide* and for a full and valuable consideration to and for a protestant purchaser, and merely and only for the benefit of a protestant; and every such grantee or person claiming under any such grant shall be deemed to be a trustee for a papist or person professing the popish religion within the aforesaid act of 13 Anne, c. 13; and all such grantees, and persons claiming under such grants, and their presentees, shall be compelled to make such discovery relating to such grants and presentations made thereupon, and by such methods, as by the said act are directed. And every devise to be made by any papist or person professing the popish religion, of any such advowson or right of presentation, collation, nomination or donation or any such avoidance, with intent to secure the benefit thereof to the heirs or family of such papist or person professing the popish religion, shall be null and void; and all such devisees, and persons claiming under such devises, and their presentees, shall in like manner be compelled to discover, whether to the best of their knowledge and belief, such devises were not made to the said intent.

But where a papist is seised of an advowson as tenant in common with another person who is not disqualified to present, the right of presentation is in such person alone; for the right of presentation is given to the universities by the foregoing statutes, only where one patron, or all who have the right of patronage, is or are disabled by professing the Roman Catholic religion, and not in the case where one papist patron is disabled and another patron is not (*x*).

Where a papist is tenant in common with a qualified patron.

In *Boyer v. Bishop of Norwich* the patron had the right of nomination only, and that out of a certain limited class, to Emmanuel College, Cambridge; and the college then presented. It was holden that this right of nomination was within the above-mentioned statutes, and that the patron being a Roman Catholic was disabled under their provisions (*y*).

Boyer v. The Bishop of Norwich.

(*x*) *Edwards v. Bishop of Exeter*, 5 Bing. N. C. p. 652.

(*y*) 1892, P. p. 41; on appeal, 1892, A. C. p. 417.



SECT. 4.—*Circumstances attending Presentations.*

We have now to consider:—

1. Who may be presented.
2. Within what time.
3. How a presentation may be made.
4. What is the form of it.
5. Whether and how it may be revoked.

Whether an alien may be presented.

It seems that an alien, who is a priest, may be presented to a church (z).

The supposed reason was, that they being spiritual persons, would not adhere to our enemies in time of war; but the contrary was found by practice (a). By 13 Ric. 2, st. 2, and 1 Hen. 5, c. 7, Frenchmen were disabled to have benefices in England. And the words of Lord Coke (b) are, “Upon consideration had of the statutes of 3 Ric. 2, 7 Hen. 4, 1 Hen. 5, Rot. Par. 6 Hen. 4, nu. 48, and 4 Hen. 6, nu. 29. If an alien or stranger born be presented to a benefice, the bishop ought not to admit him: but may lawfully refuse him, which we have added, for that the abridgments or late impressions may deceive you.”

In *Dr. Seaton's case* (8 Jac. 1), who was born in Scotland before the union of the two realms, it was adjudged that he was capable to be presented to a benefice in England; and so it was said it would have been, if he had been born in Flanders, Spain, or within any other kingdom, friend and in league with the kingdom of England; as the Bishop of Spalato, who was preferred to the deanery of Windsor, and enjoyed the same. And it was said, that such incumbent might maintain any action, real, personal, or mixed, for anything concerning the glebe or the possessions of the church, as priors aliens might have done; for although he be an alien born out of the king's dominions, yet he brings his action, not in his own right, but in the right of his church; not in his natural, but in his politic capacity; and therefore the action will lie (c).

The following may be presented — a layman or a deacon.

It seems that a deacon, or even a layman, may be presented; but he must be made a priest before he can be instituted. For by the statute of the 14 Car. 2, c. 4, none but priests only, ordained according to the form and manner by the Book of Common Prayer prescribed, are capable to be admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever. Till a very recent statute there was only one exception, namely, the king's professor of law within the University of Oxford, who might hold the prebend of

(z) 2 Roll. Abr. p. 348; 17 Vin. Abr. p. 330.

(a) Wats. c. 20, p. 214.

(b) 4 Inst. p. 338.

(c) Hughes, c. 8, p. 58; 17 Vin. Abr. 331, pl. 4, 5.

Shipton, in the cathedral church of Salisbury, although he was but a layman (*d*).

Before the 14 Car. 2, c. 4, if a layman were presented, instituted, and inducted, he was parson *de facto* (*e*). For it was not like the presentment, &c. of a woman, which was a nullity, as her incapacity was apparent. But he might be deprived (*f*). But acts done by him, while parson, were binding, as marriages, leases, &c. (*g*).

For a presentee to have another benefice, although it be above the value of 8*l.* a year in the king's books, is no cause of refusal, for that is at his own peril, and the former benefice only becomes void in such case (*h*). According to the old law, by induction to a second benefice, the first is *ipso facto* voided (*i*): but now, by sect. 11 of 1 & 2 Vict. c. 106, the avoidance of the first benefice takes place upon institution to the second (*k*). —A pluralist.

No person may present himself; and this is according to the rule of the canon law (*l*). But the books of common law say, that though a patron cannot present himself in form, yet he may offer himself to the ordinary, and pray to be admitted, and that such admission may be good. Indeed it has now been decided that the ordinary must admit him (*m*). And the same books do also agree, that where the right of presenting is vested in more persons than one (as in the case of joint tenants or joint executors), a presentation of one of them made by the rest is good (*n*). So if two executors present a third (*o*).

Whether a man may present himself.

By a decretal epistle of Pope Alexander the Third, it is enjoined, that, "if any sons of presbyters do hold churches, in which their fathers did serve as parsons or vicars, without any other intervening; they shall be removed, whether they were born in the priesthood or not" (*p*).

Whether the son next immediately after his father.

This epistle was addressed to the Archbishop of Canterbury, and it is remarkable that most of the epistles on this subject are

(*d*) Vide supra, p. 140.

(*e*) *Colt v. Bp. of Coventry*, Hob. p. 149.

(*f*) *Sutton's case*, Cro. Car. p. 65.

(*g*) *Costard v. Winder*, Cro. Eliz. p. 775.

(*h*) God. p. 271; Wats. c. 20, p. 216.

(*i*) See *Armiger v. Holland*, Cro. Eliz. p. 601.

(*k*) Vide infra, Part IV., Chap. III., sect. 6.

(*l*) X. iii. 38, 26; 13 Hen. 8, p. 14; and 14 Hen. 8, p. 2, in *Heckar's case*, Bro. Abr. Corporations, pl. 34, where it is said that for this reason a dean and chapter cannot present the dean. Vide supra, p. 142.

(*m*) *Walsh v. Bp. of Lincoln*, L.

R. 10 C. P. p. 518. See *Lowe v. Bp. of Chester*, 10 Q. B. D. p. 407; et vide supra, pp. 258, 271.

(*n*) Gibbs. p. 794; *Sir Godfrey Foljambe's case*, Mo. p. 5; Bro. Abr. Pres. al. Eg. pl. 45. The case put in Brooke contemplates that one of the joint-tenants was a priest, and declares that he may be rightly presented by the other joint-tenants.

(*o*) *Harris v. Austin*, 3 Bulst. p. 43; *Potter v. Chapman*, Amb. p. 101. This case seems to show that in Lord Hardwicke's opinion trustees cannot appoint one of themselves unless specially designated in the will.

(*p*) X. i. 17, 11.

addressed to English bishops, although the rule is not observed here.

Whether they were born in the Priesthood or not.—All the children of clergymen before the Reformation were not illegitimate; for a priest might have had children before he entered into any orders, or whilst he was in the inferior orders, as ostiary, acolyth or exorcist. For albeit the sub-deacon was charged to relinquish his wife, yet those in inferior orders might retain them. And it is said, that even priests were generally married to the women they kept in those days; and though they kept it secret, for fear of deprivation, sometimes till their death, yet they often took care that sufficient evidence of their being married might appear after their death, when they were out of the reach of the canon law (*q*).

“Although the holy fathers did so abhor the possessing of ecclesiastical benefices by hereditary right that they forbad the succession even of legitimate children into their fathers’ churches; yet some, although illegitimate, do presume to invade such churches without any mediate successor—we do ordain, that the prelates shall not presume immediately to institute or admit any such into the benefices which their fathers had, in whole or in part, and if any such have obtained the like benefices they shall be deprived (*r*).”

“*Without any mediate Successor.*”—For one intervening dis-joints and breaks the succession” (*s*).

In whole or in part.—As to a portion or pension (*t*). By a constitution of Archbishop Peccham, “Seeing it is prohibited by law, that without a dispensation apostolical the sons of rectors or presbyters shall not succeed to the churches in which their fathers did serve immediately or next before, and such benefices are void if the contrary hereunto shall be done; we do command, that the prelates shall make strict inquiry into such vacant churches, and take order therein as the law requires; taking diligent heed that for the future they admit not any such persons to the like benefices by any title whatsoever, that a way be not surreptitiously opened contrary to right to the succession of Christ’s inheritance” (*u*).

Without a Dispensation apostolical.—By virtue of which statute, in little more than fifty years from the time of the Restoration of King Charles II., there issued out of the faculty office [of the Archbishop of Canterbury] no less than three hundred dispensations of this kind for the son to succeed the father (*x*).

But in the case of *Stoke v. Sykes* (2 Car. 2) it was held by Doderidge and Jones, JJ., that this canon was not received here (*y*).

(*q*) Johns. p. 109.

(*r*) Otho Athon. pp. 46—48.

(*s*) Ibid. p. 47.

(*t*) Ibid. note (*z*).

(*u*) Lind. p. 45.

(*x*) Gibs. p. 796.

(*y*) Latch. pp. 191, 253; 1 Stillingfleet, Eccl. Cas. p. 358.

And Mr. Johnson observes, that there is no instance since the Reformation of any clerk deprived for succeeding his father without a dispensation. And indeed the great occasion of those canons against the son's succeeding the father is now removed, which was to discourage the marriage of priests, as one may see by the aforesaid constitutions (z).

The patron has six months before the lapse incurs, yet it concerns him not to delay presenting till the six months be almost expired (a). But the presentation to a benefice may be at any time within the six months, and the ordinary cannot take time to consider, and by that means a lapse incur, unless it be for just cause of refusal. And the patron may even present after the six months at any time before the ordinary collates (b). Within what time.

But if a bishop does collate his clerk either before he gives notice of an avoidance where notice is to be given, or at any time within the six months limited to the patron to fill his church, the patron may at any time after present his clerk; for although wrongful collation makes such a plenarty as shall bar the lapse to the metropolitan and king, yet it is no bar to the true patron; and if the bishop does admit the patron's clerk, the other is out *ipso facto*; and if the bishop will not admit him, the patron may as well then as at any time before have his remedy at law against the bishop. And therefore if the ordinary collates within the patron's six months, and then the six months pass, no presentation being made by the patron, the ordinary, if he will have the benefit of a lapse, must collate anew, for the first collation, being by wrong, cannot by time become rightful, and therefore does not put the patron to his *quare impedit*, for that it was but as a provision for the time, and there ought to be a new act before it shall be a good collation (c). Effect of wrongful collation.

If a church or benefice be of the patronage of the king, or he has a right of presenting thereto, he can never lose his turn to the ordinary, by his neglect of preferring his clerk thereto. And in case the king does not present, all that the ordinary can do is to sequester the profits of the church, and appoint a clerk to serve the cure (d).

The question of lapse will be found fully discussed in a later section of this chapter (f).

The six months on a *quare impedit* are understood to be six calendar months (g).

The following rules are laid down in Comyns' Digest, tit. Esglise (H. 9), and supported by cited authorities. Comyns' Digest.

(z) Johns. p. 109.

(a) Vide infra, sect. 9.

(b) *Wilson v. Dennison*, Amb.

p. 81.

(c) Wats. c. 12, p. 112.

(d) Ibid. p. 109; 2 Inst. p. 273; 14 Hen. 7, 21; Bro. Abr. tit. Quare Impedit, pl. 90.

(f) Vide infra, sect. 9.

(g) 2 Inst. p. 360; *Tullet v. Linfield*, 3 Burr. 1455.

Every common person ought to present within six months after the church becomes void by the death of the incumbent, otherwise the presentation lapses to the bishop, though the patron presents and his clerk is refused for inability. So if a church becomes void by statute, as by acceptance of a plurality, for the patron ought to take notice at his peril; or by certificate of the bishop for non-payment of tenths according to the statute. So if a church becomes void by cession. But if an avoidance be by resignation or deprivation, the six months do not commence till notice of the avoidance be given by the ordinary to the patron, even though the patron was a party in the suit, and it must be given by the ordinary and no other person. Though the bishop dies, lapse does not occur to his successor without notice, though the temporalities are in the king's hands.

Whether it
may be by
word.

It is said generally in all the books that presentation may be made either by word or by writing. If it be by word, the patron must declare in the presence of the ordinary; if by writing, it is no deed, but is in the nature of a letter missive to the bishop (*i*).

But where a corporation aggregate of many presents it must be under their common seal (*k*).

And since the statute of frauds at least (*l*), it is necessary that all presentations shall be in writing (*m*).

And by the stamp acts it was implied, that they shall be in writing, and not otherwise.

All stamp duty, however, on presentations has now been abolished.

Form of the
presentation.

A presentation may be in this form:—

To the most reverend father in God, R. by Divine Providence Lord Archbishop of Canterbury, primate of all England and metropolitan: (if it be to the Archbishop of York, the word "all" must be omitted; if to any other bishop, then thus:—)

To the right reverend father in God, R. Lord Bishop of ——— or in his absence to his vicar-general in spirituals, or to any other person having or who shall have sufficient authority in this behalf, I, Sir W. P., baronet, true and undoubted patron of the rectory of the parish church of ——— [or, of the vicarage of ———] in the county of ———, and in your diocese of ———, now vacant by the death [or resignation, or otherwise as the case shall be] of A. B., the last incumbent there, do present unto you C. D. clerk, master of arts, humbly requesting that you will be pleased to admit the said C. D. to the said church, and to institute and to cause him to be inducted into the same, with all its rights, members, and appurtenances, and to do and execute all other things in this behalf which shall belong to your episcopal office. In witness whereof, I have hereunto set my hand and seal, the ——— day of ——— in the year ———.

(*i*) 1 Inst. p. 120; 2 Roll. Abr. p. 353.
(*k*) Gibs. p. 794.

(*l*) 29 Car. 2, c. 3.
(*m*) 3 Cruise's Dig., Chap. ii., § 1, p. 11.

Which being made in this form, if the bishop be inhibited or the see voided before institution is had from the immediate bishop, yet the presentation is good to the metropolitan or other guardian of the spiritualities ⁽ⁿ⁾.

If a corporation in presenting mistakes the name of their foundation, the presentation is void; therefore when a provost did present by the name of the provost of the Queen in Oxon, whereas it should have been *aulæ scholarium reginæ de Oxon*, according to the foundation, it was adjudged, that by reason of the omission of the word *scholarium*, several presentations did not make an usurpation, because the presentations were void (o).

Presentation, though duly made in all respects, may be revoked or varied. As to the power of revocation, the general doctrine of the books seems to be, that none but the king can revoke, which he may do at any time before induction; as he may also present a second clerk, and such presentation shall be a good repeal of the first, especially if care is taken to free it of all suspicion of being obtained by fraud in deceit of the king, by making express mention of the first presentation. In like manner, if the king dies before the induction of his clerk, this is said to be a revocation in law. And the general consequence of a right to revoke in any case is an obligation upon the bishop not to admit against such revocation upon pain of being a disturber (p).

Whether presentations may be revoked;

But it does not seem to be clearly settled that a common person also may not revoke a presentation before admission and institution thereupon. And in the case of *Stoke v. Sykes* (3 Car. 2) Doderidge said that the civilians affirm that a lay patron cannot revoke his presentation, but he may *cumulando variare*, and so the ordinary shall have election to institute which of them he will, but that a spiritual person cannot vary at all; but he said that by the common law without question, a patron may revoke his presentation (q), and that it was the opinion of an erudite civil lawyer that the canon did not hold in this church.

And what is said in the books that the king only can revoke, seems to intend after institution, the church not being full against the king until the induction; but after institution it is certain a common person cannot revoke, it being then too late, the church being full with respect to him by the institution.

Late cases leave no doubt that a lay patron may revoke his presentation, and it should seem that such revocation cannot be

(n) Wats. c. 15, p. 150.

(o) *Dr. Ayry v. Sir Richard Lovelace*, 1 Bulst. p. 91. See Wats. c. 20, p. 222.

(p) Gibs. p. 795; Wats. c. 20,

p. 223; 2 Roll. Abr. p. 183, l. 40; 3 Dyer, p. 327.

(q) Latch. pp. 191, 253. See *Anon.*, Keilwey, p. 154.

void for simony (*r*) ; and Mirehouse is of opinion that it is now settled that, as no interest is vested before institution, a lay patron may revoke (*s*).

or varied.

As to the power of varying, it is agreed on all hands that this may be done by a common person ; that is, after one clerk has been presented, he may (before admission given) present another ; but with this difference from a revocation, that where a patron does thus vary *cumulando* the ordinary may choose and admit which of the clerks he pleases (*t*).

But this power of varying belongs to laymen only, and not to ecclesiastical persons of any kind ; because they are supposed in law to be competent judges of the sufficiency of the person, and do therefore proceed by judgment and election ; and whoever elects an unfit person is *ipso jure* deprived of the power of electing (*u*).

This distinction between laymen and ecclesiastical persons is to be found in the Decretal of Gregory, iii. 38, 24, and in Lindwood, p. 215. If a layman present two, *judicio episcopi relinquendum est* ; if a college or ecclesiastical person present two, *Qui prior est tempore jure potior esse videtur*.

Comyns' Digest.

The following dicta are to be found in Comyns' Digest, supported by cited authorities, tit. Esglise (II. 10). The king may revoke any time before induction, though a letter be sent to the archdeacon to induct, and on the second presentation the former is void without notice to the ordinary. A patroness, though a spiritual person, as an abbess, might vary her presentation, for she is not more apprised than a lay patron of the sufficiency of her clerk. If the king make a second presentation without mention or revocation of the former, it is void ; that is to say, if it be after institution to the former. So too, if the second presentation be obtained by deceit or covin to the king, it is void.

SECT. 5.—*Examination by the Ordinary.*

The next division of the present subject relates to one of the most important features in the government of the church, namely, the duty and right of the ordinary to examine the presentee, and, if he be found unfit, to refuse him institution.

Original right of examination in the bishop.

It is very well known, as observed by the learned Stillingfleet, that in the settlement of this church of England, the bishops of the several dioceses had them under their own immediate care ; and that they had the clergy living in a community with them,

(*r*) *Rogers v. Holled*, 2 Black. W. p. 1039.

(*s*) Mirehouse on Advowsons, p. 157.

(*t*) *Gibs*. p. 795 ; *Wats*. c. 20, p. 225.

(*u*) *Ibid*. See *Att.-Gen. v. Wycliffe*, 1 Ves. p. 79.

whom they sent abroad to several parts of their dioceses, as they saw occasion to employ them; but that by degrees they found a necessity of fixing presbyters within such a compass to attend upon the service of God amongst the inhabitants; that these precincts, which are since called parishes, were at first much larger; that when lords of manors were inclined to build churches for their own conveniences, they found it necessary to make some endowments to oblige those who officiated in their churches to a diligent attendance; that upon this, the several bishops were very well content to let those patrons have the nomination of persons to those churches, provided they were satisfied of the fitness of those persons, and that it were not deferred beyond a limited time. So that the right of patronage is really but a limited trust; and the bishops are still in law the judges of the fitness of the persons to be employed in the several parts of their dioceses. But the patrons never had the absolute disposal of their benefices upon their own terms; but if they did not present fit persons within the limited time, the care of the places did return to the bishop, who was then bound to provide for them (x).

And by the statute of *Articuli Cleri*, 9 Edw. 2, st. 1, c. 13, 9 Edw. 2, st. 1, c. 13. it is enacted as follows: "Also it is desired that spiritual persons, whom our lord the king doth present unto benefices of the church (if the bishop will not admit them, either for lack of learning, or for other cause reasonable) may not be under the examination of lay persons in the cases aforesaid, as it is now attempted, contrary to the decrees canonical; but that they may sue unto a spiritual judge for remedy, as right shall require." The answer: "Of the ability of a parson presented unto a benefice of the church, the examination belongeth to a spiritual judge; so it hath been used heretofore and shall be hereafter."

Of the Ability of a Parson presented.—*De idoneitate personæ*: So that it is required by law that the person presented be *idonea persona*; for so be the words of the king's writ; *præsentare idoneam personam*. And this *idoneitas* consists in divers exceptions against persons presented: 1. Concerning the person, as if he be under age, or a layman. 2. Concerning his conversation, as if he be criminous. 3. Concerning his inability to discharge his pastoral duty, as if he be unlearned, and not able to feed his flock with spiritual food (y).

And the examination of the ability and sufficiency of the person presented belongs to the bishop, who is the ecclesiastical judge; and in this examination he is a judge, and not a minister, and may and ought to refuse the person presented, if he be not *idonea persona* (z).

(x) 1 Stillingfleet, Eecl. Cas.—A discourse concerning bonds of resignation—p. 32. See Selden on Tithes, c. 12, § 2, p. 375.

(y) 2 Inst. p. 631.

(z) Ibid. See *Willis v. Bp. of Oxford*, 2 P. D. p. 192.

The Examination belongeth to a Spiritual Judge.]—Lord Coke says that in some cases, notwithstanding this statute, *idoneitas persone* shall be tried by the country, or else there should be a failure of justice, which the law will not suffer; as if the inability or insufficiency be alleged in a man that is dead, this case is out of the statute; for in such case the bishop cannot examine him; and consequently, though the matter be spiritual, yet shall it be tried by a jury; and the court, being assisted by learned men in that profession, may instruct the jury as well of the ecclesiastical law in that case, as they usually do of the common law (a). It is to be observed that Lord Coke speaks of some cases; what these cases are will be seen by reference to the subsequent cases of *Rex v. Archbishop of Canterbury and Bishop of London* (b), and *The Bishop of Exeter v. Marshall* (c).

Time for
examination.

And so it hath been used heretofore.]—So as this act is a declaration of the common law and custom of the realm (d).

By a constitution of Archbishop Langton: "We do enjoin that if any one be canonically presented to a church and there be no opposition, the bishop shall not delay to admit him longer than two months, provided he be sufficient" (e).

Canon 95.

But by Can. 95 of 1603, "Albeit by former constitutions of the church of England, every bishop hath had two months space to inquire and inform himself of the sufficiency and qualities of every minister, after he hath been presented unto him to be instituted into any benefice; yet for the avoiding of some inconveniences, we do now abridge and reduce the said two months unto eight and twenty days only. In respect of which abridgment we do ordain and appoint that no double quarrel shall hereafter be granted out of any of the archbishop's courts, at the suit of any minister whomsoever, except he shall first take his personal oath, that the said eight and twenty days at the least are expired, after he first tendered his presentation to the bishop, and that he refused to grant him institution thereupon; or shall enter bonds with sufficient sureties to prove the same to be true; under pain of suspension of the grantor thereof from the execution of his office for half a year *toties quoties*, to be denounced by the said archbishop, and nullity of the double quarrel aforesaid so unduly procured, to all intents and purposes whatsoever. Always provided, that within the said eight and twenty days, the bishop shall not institute any other to the prejudice of the said party before presented, *sub pœna nullitatis*."

Every Bishop hath had.]—The canon mentions bishops only, because institution belongs to them of common right; but it must also be understood to extend to others (if there be any such now left in existence), who have this right by privilege or

(a) 2 Inst. p. 632.

(b) 15 East, p. 117.

(c) L. R. 3 H. L. p. 17.

(d) 2 Inst. p. 632.

(e) Lind. pp. 138, 215.

custom, as deans, deans and chapters, and others who have peculiar jurisdictions (*f*).

To inquire and inform himself.]—In answer to an objection made that the bishop ought to receive the clerk of him that comes first, otherwise he is a disturber, Hobart says the law is contrary; for as he may take competent time to examine the sufficiency and fitness of a clerk, so he may give convenient time to persons interested, to take knowledge of the avoidance (even in case of death, and where notice is to be taken and not given) to present their clerks to it. Agreeable to what is held elsewhere, that it was a good plea for the ordinary, and no refusal of the clerk, that the ordinary having other business commanded the clerk to come to him afterwards to be examined; and that the clerk not returning and the six months passing, the ordinary was well entitled to the lapse (*g*).

By Can. 39 of 1603, "No bishop shall institute any to a benefice who hath been ordained by any other bishop, except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it; and, lastly, shall appear, upon due examination to be worthy of his ministry." Canon 39.
Manner of
examination.

Except he first show unto him his Letters of Orders]—And by 14 Car. 2, c. 4, s. 10, no person shall be capable to be admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever before such time as he shall be ordained priest.

And bring a sufficient Testimony of his former good Life and Behaviour.]—By the ancient laws of the church, and particularly of the church of England, the four things in which the bishop was to have full satisfaction in order to institution, were age, learning, behaviour, and orders. And there is scarce any one thing which the ancient canons of the church more peremptorily forbid than the admitting clergymen of one diocese to exercise their functions in another without first exhibiting the letters testimonial and commendatory of the bishop by whom they were ordained. And the constitutions of the archbishops Reynolds and Arundel show that the same was the known law of the English Church, to wit, that none should be permitted to officiate (not so much as a chaplain or curate) in any diocese in which he was not born or ordained, unless he bring with him his letters of orders and letters commendatory of his diocesan (*h*).

Notwithstanding which, in the case of *Palmer v. the Bishop of Peterborough* (33 Eliz.) on a *quare impedit* brought against the bishop, the bishop pleaded that he demanded of the presentee of the plaintiff to see his letters of orders, and he would not show them; and also he demanded of him letters missive or testimonial,

*Palmer v.
Bishop of
Peterborough.*

(*f*) Gibs. p. 804. See *Wrighton v. Browne*, 3 Lev. p. 212. p. 46; *Elvis v. Abp. of York*, Hob. p. 317.

(*g*) Gibs. p. 804; *Anon.*, 3 Leon. (*h*) Gibs. p. 806; Lind. p. 139.

testifying his ability: and because he had not his letters of orders nor letters missive, nor made proof of them otherwise to the bishop, he desired leave of the bishop to bring them; and he gave him a week, and he went away and came not again, and that the six months passed, and he collated by lapse. And upon demurrer it was adjudged for the plaintiff, for that these were not causes to stay the admittance, and the clerk is not bound to show his letters of orders or missive to the bishop, but the bishop must try him upon examination for one and other (i). And, per Anderson, the bishop may examine him upon oath, if he hath orders or not.

Which most of the books take notice of as a pretty hard case, and in which perhaps the bishop's taking advantage of the lapse might be some part of the consideration. And these words of the canon (which was made not many years after) seem to have some reference or retrospect to that determination.

But it is to be observed, first, as to the letters of orders, that it was only adjudged not to be necessary to produce the very letters of orders; for they might be lost, and proof thereof might otherwise be very well made from the registry of the bishop who ordained the clerk; or else it would follow that every clergyman whose letters of orders are lost or consumed by fire or other accident, would be incapable to be admitted to a benefice. And as to the letters testimonial, the bishop charged that he did not bring such letters testifying his ability, which the court seems to have understood of his ability as to learning, of which without doubt the bishop must judge upon examination; but the bishop ought to have set forth that he did not produce letters missive or testimonial of his good life and behaviour.

*Bishop of
Exeter v.
Marshall.*

In the case of *The Bishop of Exeter v. Marshall*, the House of Lords ruled as follows: That the right of a patron to present to a benefice is a legal right, subject in its exercise to the bishop's right to examine into the fitness of the presentee, and to reject him for sufficient ground.

That a clerk who has held preferment in one bishopric is not, on being presented to a living in another bishopric, bound, as a condition precedent to his examination on the question of fitness, to produce letters testimonial and commendatory from his former bishop.

That in *quare impedit*, upon a rejection of the patron's presentee, the bishop must state not only that the presentee is not a fit person, but also in what respect he is not fit, and state it in such a manner as will enable the patron to take issue on the objection, and a proper tribunal to judge of its soundness.

That an allegation in the plea that the bishop had good reason to believe that the presentee had been guilty of an attempt to commit simony is not sufficient: and it would seem that a plea alleging presentation by the bishop as on a lapse must

(i) Cro. Eliz. p. 241; S. C., 1 Leon. p. 230.

allege notice to the patron of the circumstances under which the bishop would so claim to present (*k*).

And lastly shall appear, upon due Examination, to be worthy of his Ministry..]—As to the matter of learning, it has been particularly allowed, not only by the Courts of the King's Bench and Common Pleas, but also by the High Court of Parliament, that the ordinary is not accountable to any temporal court (!) for the measures he takes, or the rules by which he proceeds, in examining and judging (only he must examine in convenient time, and refuse in convenient time); and that the clerk's having been ordained (and so presumed to be of good abilities), does not take away or diminish the right which the statute above recited does give to the bishop to whom the presentation is made, to examine and judge (*m*). Bishop Stillingfleet says—

“By the ecclesiastical law, the bishop is judge of the fitness of any clerk presented to a benefice. This is confessed by the Lord Coke. . . . But this is plain to have been the ancient ecclesiastical law of this realm, by the *Articuli Cleri* in Edw. II.'s reign. By the provincial constitutions at Oxford in the time of Henry II., the bishop is required to admit the clerk who is presented without opposition, within two months, ‘*dum tamen idoneus sit*,’ if he thinks him fit. So much time is allowed ‘*propter examinationem*,’ saith Lyndwood, even when there is no dispute about right of patronage. The main thing he is to be examined upon is, his ability to discharge his pastoral duty, as Coke calls it, or as Lyndwood saith, whether he be ‘*commendandus scientiâ et moribus*.’ As to the former, the bishop may judge himself, but as to the latter, he must take the testimonials of others; and I heartily wish the clergy would be more careful in giving them, by looking on it as a matter of conscience and not merely of civility; for otherwise it will be impossible to avoid the pestering the church with scandalous and ignorant wretches. If the bishop refuses to admit within the time (which by the modern canons is limited to twenty-eight days after the presentation delivered (*n*)), he is liable to a *duplex querela* in the ecclesiastical courts, and a *quare impedit* at common law; and then he must certify the reasons of his refusal (*o*). In *Specot's case* it is said that in 15 Hen. 7, 7, 8, All the judges agreed that the bishop is judge in the examination, and therefore the law giveth faith and credit to his judgment. But because great inconveniences might otherwise happen, the general allegation is not sufficient, but he must certify specially and directly; and the general rule is, and it was so resolved by the judges, that all such as are sufficient causes of

Bishop Stillingfleet's remarks on the ordinary's power of examining and refusing a presentee.

(*k*) *Bp. of Exeter v. Marshall*, L. R. 3 H. L. p. 17.

(*l*) But it seems that his decision may be examined in the Court of Appeal of the Province. *Willis v. Bp. of Oxford*, 2 P. D. p. 192.

(*m*) *Gibs*. p. 807; *Hele v. Bp. of Exeter*, Show. p. 88; 4 Mod. p. 134; 3 Lev. p. 313.

(*n*) Can. 95.

(*o*) 5 Co. p. 57.

deprivation of an incumbent are sufficient causes to refuse a presentee (*p*). But by the canon law more are allowed. In the constitutions of Othobon the bishop is required to inquire particularly into the life and conversation of him that is presented; and afterwards that if a bishop admits another who is guilty of the same fault for which he rejected the former, his institution is declared null and void (*q*). By the canon law, if a bishop maliciously refuses to admit a fit person, he is bound to provide another benefice for him; but our ecclesiastical law, much better puts him upon the proof of the cause of his refusal. But if the bishop does not examine him, the canonists say that it is a proof sufficient that he did it *malitiosè*. If a bishop once rejects a man for insufficiency, he cannot afterwards accept or admit of him, as was adjudged in the *Bishop of Hereford's case* (*r*). If a man brings a presentation to a benefice, the bishop is not barely to examine him as to life and abilities, but he must be satisfied that he is in orders. How can he be satisfied unless the other produces them? How can he produce them, when it may be they are lost? The canon is express that no bishop shall institute any to a benefice who hath been ordained by any other bishop (*s*)—(for if he ordained himself, he cannot after reject him, because the law supposes him to have examined and approved him)—except he first show unto him his letters of orders, and bring him a sufficient testimony of his former good life and behaviour, if the bishop shall require it; and lastly shall appear upon due examination to be worthy of the ministry.” He then comments upon *Palmer v. The Bishop of Peterborough* (*t*), which he calls by mistake “*Palmer and the Bishop of Exeter's case*.” And says: “But if a proof were necessary, and the clerk did not come to make proof, it seems to me to be a very hard judgment” (*u*).

Rex v. The Archbishop of Canterbury and Bishop of London.

The case of *Specot* (*x*), here referred to by Bishop Stillingfleet, was commented upon in *Rex v. The Archbishop of Canterbury and Bishop of London* (*y*). In this celebrated cause the Court of King's Bench refused an application for a mandamus to compel the Bishop of London to admit the Rev. R. Povah to an endowed lectureship, requiring him “to license and approve under 14 Car. 2, c. 4.” The bishop made affidavit that he “conscientiously disapproved.” Lord Ellenborough delivered a luminous judgment, based indeed in this instance upon the express words of the statute, but containing a masterly exposition of the general authority of the bishop to refuse as conse-

(*p*) See now *Heywood v. Bp. of Manchester*, 12 Q. B. D. p. 404.

(*q*) *Multa impediunt promovendum quæ non deiciunt*. Gloss in c. 15, de vit. et honest. Cleric. C. Christianæ, f. 63; De jure patron. c. Pastoralis Officii. Gloss in Can. et *malitiosè*. The references in this note are those given in the passage quoted in the text from Stillingfleet,

Eccl. Cas. pp. 70—75.

(*r*) Cro. Eliz. p. 27.

(*s*) Can. 39.

(*t*) Cro. Eliz. p. 341; 1 Leon. p. 230.

(*u*) 1 Stillingfleet, Eccl. Cas. pp. 70—75.

(*x*) 5 Co. p. 57.

(*y*) 15 East, p. 117.

quent on his power to examine a presentee to any ecclesiastical office. In the course of this judgment Lord Ellenborough observed as follows: "In *Specot's case* it is decided that it is not allowable to plead generally that the clerk presented is an inveterate schismatic. That case was much discussed, and there was great debate among the judges whether a plea pleaded in this generality were good or not. I think the judges were equally divided in the Common Pleas; upon which the opinion of the other judges was taken, when the greater part decided that it was not a good plea; and this judgment was afterwards affirmed in the King's Bench, upon a writ of error; and it was held, according to the report of the case in 5 Co. 58, (and which is also reported in Anderson, 189, and 3 Leonard, 198,) that the cause of the schism or heresy, for which the presentee is refused, ought to be alleged in certain, to the intent that the King's Court may consult with divines whether it be schism or no; and if the party be dead, thereupon to direct the jury to try it: but if it be traversed, and the party refused be alive, it shall be tried by the metropolitan. The authority which belongs to *Specot's case* has been certainly questioned, or, as the attorney-general said yesterday, it has been a good deal shaken by the case of *Hele v. The Bishop of Exeter and others*" (z). "It was there maintained that it was a good plea on the part of the bishop, that the presentee was *minus sufficiens in literaturâ*, without stating in what particulars. It was contended that he should state in what respects he was *minus sufficiens*, &c.; because in case of the death of the party it could not be tried by the archbishop, but must be tried by the jury. It is so laid down certainly in the books; but a trial of that sort has never occurred in our times, nor is there any instance of it, that I am aware of, to be found in our books: and if such a case should happen, it does not occur to me how such a trial could conveniently proceed. Suppose a jury of twelve farmers collected in the jury-box, addressing themselves to try the literature of a departed person: how are they to set about it? are they to try it by evidence of his reputation for literature generally; or are they to try it by the particular documents in proof of his literature, which he may have left in the shape of Latin or Greek exercises, produced upon his examination before the bishop, and upon which the bishop pronounced at the time when he refused to institute him? It would be somewhat strange to present to the grave attention of such a panel the translation which the deceased may have made from some part of the sacred writings in the Greek tongue, or his Latin composition upon a theme which may have been handed to him by the bishop; to hear counsel haranguing them upon topics of grammatical construction or verbal criticism, and to see them assisted by a judge (who possibly may not himself be very deeply learned in the dead languages), addressing their minds to

(z) Show. p. 88.

try whether some learned bishop is right in the judgment he has formed upon the same materials, and sitting as a court of error from him in matters of grammar. I wish that the law-books, which tell us that it belongs to a judge and jury to decide such points, had at the same time instructed us how we are adequately to perform the task. As no case has been referred to as having yet happened, so I hope none will ever arise; for however well constituted we may be for other purposes, everybody must see that a very imperfect and blind execution of duty must take place, if the trial of literature were committed to such a tribunal. I merely advert to these, as topics presented by the large discussion of yesterday, by the mention of *Specot's case*, and that of *Hele v. The Bishop of Exeter*, which last was however, I think, very briefly adverted to."

Whether answers in writing can be required.

An examination of the presentee himself by written questions and answers was adopted in two modern instances. In the first, the Privy Council said (*a*) that as Mr. Gorham did in fact answer nearly all the questions, and no complaint is made of his not having answered them all, it was "relieved from the necessity of considering whether he could or could not lawfully have declined to submit to such a course of examination." In the second case, the examination and its bearing upon the points at issue became unimportant, and no judicial opinion was expressed as to its lawfulness or otherwise (*b*).

Causes of refusal.

The most common and ordinary cause of refusal is want of learning. But there are also many other causes for which a clerk presented may lawfully be refused; as, if he be perjured before a lawful judge; or if he be an heretic or schismatic; or irreligious; or (as is said in the old books) if he is a bastard, and not dispensed withal; or if he is within age; or if he or his patron (*c*) be excommunicated for the space of forty days; or if he be outlawed; or guilty of forgery; or has committed simony in the procuring of the presentment he brings, or of another presentment to a former benefice; or has committed manslaughter, that is, if he be attainted thereof, and not pardoned. And it is said, that the ordinary may refuse a clerk upon his own knowledge for an offence committed by him, which is a good cause of refusal, although he be not convicted thereof by the law; and this shall be tried by issue, whether it be true or not: and generally, all such as are sufficient causes of deprivation are also sufficient causes of refusal (*d*).

In *Bell v. Bishop of Norwich* (*e*), it appears to have been decided that it is not a good answer for the ordinary that he refused because the presentee was criminous in that he did some act forbidden by law, but not *malum in se*.

(*a*) Moore's Special report, p. 459.

(*b*) *Heywood v. Bp. of Manchester*, 12 Q. B. D. p. 404.

(*c*) Query as to this now.

(*d*) Wats. c. 20, p. 215; *Specot's case*, 5 Co. p. 57. This proposition

was pushed very far in *Heywood v. Bp. of Manchester*.

(*e*) Dyer, p. 254 b. But see *Heywood v. Bp. of Manchester*, 12 Q. B. D. 404.

In the case of *Albany v. The Bishop of St. Asaph* (27 Eliz.), the want of knowledge in the Welsh tongue was declared to be a good cause of refusal, where the service was to be performed in that language, as rendering the clerk incapable of the cure; nor did it avail to allege that the language might be learned, or that the part of the cure he was incapable of might be discharged by a curate (*f*). Knowledge of the Welsh tongue, when necessary.

The law is the same if the person presented does not understand the English tongue; for in such case the bishop may refuse him for incapacity (*g*).

Where there is a mixture of divers languages in any place, the rule of the canon law is, that the person presented do understand the several languages (*h*).

By 6 & 7 Will. 4, c. 77, the ecclesiastical commissioners were directed to prepare and lay before the king in council a scheme for preventing the appointment of any clergyman not fully conversant with the Welsh language to certain benefices with cure of souls in Wales. 6 & 7 Will. 4, c. 77.

This provision was repealed by 1 & 2 Vict. c. 106, in order that others "of more general and extensive application" might be enacted, and the following provisions were made: 1 & 2 Vict. c. 106.

Sect. 104. "Within the several dioceses of Saint Asaph, Bangor, Llandaff, and Saint David's, it shall and may be lawful for the bishop, if he shall think fit, to refuse institution or licence to any spiritual person who after due examination and inquiry shall be found unable to preach, administer the sacraments, perform other pastoral duties, and converse in the Welsh language: Provided always, that any such spiritual person may, within one month after such refusal, appeal to the Archbishop of Canterbury, who shall either confirm such refusal or direct the bishop to grant institution or licence, as shall seem to the said archbishop just and proper: Provided also, that nothing hereinbefore contained shall be construed to affect or abridge any rights which the inhabitants of any benefice within the said four Welsh dioceses may at present by law possess of entering a caveat against or objecting in due course of law to the institution, collation, or licence of any spiritual person, or of proceeding to procure the deprivation of any such person." Provision for benefices in certain Welsh dioceses.

Sect. 105. "All the provisions and powers of this act relating to the appointment of curates where the ecclesiastical duties are inadequately performed shall, within the several dioceses of Saint Asaph, Bangor, Llandaff, and Saint David's, extend and apply to cases wherein the bishop shall see reason to believe that the ecclesiastical duties of any benefice are not satisfactorily performed by reason of the insufficient instruction in the Welsh language of the spiritual person serving such benefice." Provision for curates in certain Welsh dioceses.

Due Examination and Inquiry.—These words refer to the

(*f*) Gibs. p. 807; Cro. Eliz. p. 119.

(*g*) Wats. c. 20, p. 214; *Colt v. Bp. of Coventry*, Hob. p. 148.

(*h*) Gibs. p. 807; X. i. 31, 14.

Notice to the
patron of
refusal.

power of the clerk to speak Welsh. Every bishop of the four Welsh dioceses has an absolute discretion to decide that a presentee to any benefice in his diocese shall be Welsh speaking (*i*).

If the clerk refused be the presentee of a bishop or other ecclesiastical patron, the ordinary is not bound to give notice of the refusal; or if he should do it, such patron can never revoke nor vary his presentations, by presenting one afterwards that is better qualified, without the ordinary's consent, the law supposing him that is a spiritual person to be capable of choosing an able clerk; and so lapse may come to him unavoidably if the clerk first presented be justly refused. But if the clerk presented be the presentee of a lay patron, and be refused by the ordinary, the ordinary in most cases is bound to give notice to the patron of such refusal; for if in such case no notice is given, no lapse can run, though no other clerk be presented; nor if notice be given, unless upon trial the clerk was justly refused (*k*). But if a clerk presented be for good cause refused, and notice thereof be in due time and manner given to the patron, and no other clerk be presented in time, lapse runs to the ordinary (*l*).

In *Hele v. The Bishop of Exeter* (3 Will. 3) (*m*), it was said by the court that if the ordinary refuse because the clerk is criminal, the ordinary need not give notice of the refusal, for the crime is as much in the cognizance of the patron as of the bishop; but if he refuse because illiterate, he must give notice.

And in general, Lord Coke says, if the cause of refusal be for default of learning, or that he is an heretic, schismatic or the like, belonging to the knowledge of ecclesiastical law, there the ordinary must give notice thereof to the patron; but if the cause be temporal, as felony, or homicide, or other temporal crime, or if the disability grow by any act of parliament or other temporal law, there no notice need be given, unless notice be prescribed to be given thereby (*n*).

But in the case of *The King v. The Bishop of Hereford*, where the refusal was of a common drunkard and common swearer, who was presented by the king, and it was argued that in this case no notice need to be given, because *nullum tempus occurrit regi*, and no lapse could incur if he did not present again within the six months; yet the court resolved that the plea was bad, for want of notice alleged (*o*).

At least in all cases it is fair and equitable to give notice to the patron of the refusal, whatever the cause may be; for it is very possible that the person presented may be many ways unfit, and the patron not know it.

And it is not enough that the bishop barely give notice of his refusal, unless he also signify the cause of it. For although

Reasons of
refusal
required.

(*i*) *Abergavenny (Marquis of) v. Bp. of Llandaff*, 20 Q. B. D. p. 460.

(*k*) 14 Hen. 7, p. 21; Bro. Abr. Quare Impedit, p. 90.

(*l*) Wats. c. 12, p. 113.

(*m*) 2 Salk. p. 539.

(*n*) 2 Inst. p. 631.

(*o*) Gibs. p. 807; Com. Dig. p. 358.

the bishop is judge in the examination, yet inasmuch as the proceedings of the bishop are not of record, the cause of refusal is traversable; and if it be traversed, and the party refused be living, this shall be tried by the metropolitan; and if he be dead, this shall be tried by the country (*p*).

And the notice ought to be personal by letters from the bishop to the patron; it is not sufficient that it be fixed to the door of the same church, unless the patron is out of the county. And notice must be given though the patron had personal notice before of the refusal of a former presentee, and the patron still continues in the same county. It shall not be a cause of refusal that he does not produce his letters of orders, for perhaps they are lost, or that he had not any letters testimonial (*q*).

How to be given.

And such notice ought to be given with as much speed as conveniently may be; and, therefore, where the ordinary delayed to give notice to the patron for the space of twenty-two days, it was held that the notice was insufficient, and that therefore the bishop should have no advantage by lapse (*r*).

Time of giving.

And notice is to be given in such cases to the person of the patron, if he be within the county where the church is at the time of the giving thereof; otherwise it is to be given to him by an instrument in writing, affixed to the door of the church to which the clerk was presented; but if notice be given by such instrument as aforesaid, before the patron be inquired after, and a return made that he is not to be found within the county, such notice is not good (*s*).

When the bishop has given notice of his refusal of a clerk, this does not give the patron a longer time to present in than he had before. For if the church be so void that the bishop is not bound to give the patron notice of the avoidance, the patron must present his second clerk (if he thinks his first presentation to be justly refused) within the six months, accounting from the time the avoidance happened. But if the church be void by such means, as that the six months do not run without due notice to the patron of the avoidance, and the patron does present his clerk before the ordinary has given him any notice thereof; if the ordinary does refuse his clerk, and give notice of his refusal, yet the patron (as it seems) has six months, accounting from the notice of the bishop's refusal to make his second presentment in, before lapse can incur. But if the bishop had given notice of the avoidance before the patron presented, and then he refuses the patron's clerk for just cause,

No extended time for presenting allowed after notice given.

(*p*) 5 Co. p. 58; see p. 318, p. 119.
supra.

(*q*) Com. Dig. tit. Esglise (I.), Admission, &c.

(*r*) Wats. c. 20, p. 216; *Albany v. Bp. of St. Asaph*, Cro. Eliz.

(*s*) Wats. c. 20, p. 217; *Abp. of York and Willock's case*, 3 Dyer, p. 327 b; *Anon.* 3 Leon. p. 47; *Albany v. Bp. of St. Asaph*, Cro. Eliz. p. 119.

and does give notice thereof, the patron's six months are to be accounted from the first notice (*t*).

No power to
retract
refusal.

If the bishop refuse a clerk for insufficiency, and the patron presents another, and the bishop admits the first, he is a disturber; for having once refused him for insufficiency he cannot afterwards accept him (*u*).

SECT. 6.—*Remedies of Clerks.*

Duplex querela
in the spiritual
court.

When the bishop without good cause refuses or unduly delays to admit and institute a clerk to the church to which he is presented, the clerk may have his remedy against the bishop in the ecclesiastical court, as the patron may in the temporal court.

When
allowed.

This remedy the clerk may have before the ordinary to whom appeals are to be made by the way of a *duplex querela*; that is to say, if a bishop refuses, then before the archbishop in his court of appeal; if an archbishop refuses, then before the Privy Council (*v*).

And if the bishop admits the clerk, and then refuses to institute him, the clerk may have the same remedy against the ordinary to enforce him to do his duty; that is, the clerk presented having exhibited his presentation to the bishop, or to his vicar-general (having power to institute), and being refused or unjustly delayed, and complaining to the judge of appeal thereof, the judge is wont to write to the bishop in form of law, and this writing they call a *duplex querela*.

Procedure in.

This *duplex querela* is to contain a monition to the bishop, or to his vicar-general (having power to give institution), that within a certain time, as within nine or sometimes fifteen days, he admit the party complaining; and also a citation, whereby the bishop may be cited to appear by himself or proctor at a day after, in case he does not institute as aforesaid, to show cause why, by reason of his neglect of doing justice, the right of institution is not devolved to the superior judge. It is also expedient that the same *duplex querela* do contain an inhibition to the bishop and to such vicar-general as aforesaid, that nothing be done by either of them pending the suit, to the prejudice of the party complaining (*x*).

The clerk refused, having obtained from the proper judge a *duplex querela*, is to take care that some person, sufficiently

(*t*) Wats. c. 20, p. 217. Vide *infra*, sect. 9.

(*u*) Gibs. p. 807.

(*v*) A clerk who is himself patron will not be allowed to sue the ordinary at the same time in *quare*

impedit and in *duplex querela*, but will be put to his election: *Walsh v. Bp. of Lincoln*, L. R., 4 Adm. & Eccl. p. 242.

(*x*) *Hutton's case*, Hob. p. 15; Can. 95 of 1603.

learned for that purpose, do admonish the bishop to admit him and to do justice within the time mentioned in the *duplex querela*, and also according to the contents thereof to inhibit the bishop.

If the bishop, after he is admonished to institute the presentee, shall expressly refuse to admit him, the mandatory may presently cite the bishop to appear, according to the contents of the *duplex querela*; but if no refusal be made, the bishop being admonished as aforesaid, the clerk is first to repair to the bishop, or such his vicar-general as aforesaid, on the third day after, if no more than nine days are mentioned in the *duplex querela*, or on the fifth day after, if fifteen days be appointed therein, and to exhibit his presentation, and to require admission and justice in all respects to be done to him, and offer himself ready to subscribe the Thirty-nine Articles of religion, and the declaration as required by law, and to take the oaths, and to do every other thing required by law to be of him performed, in respect of his admission and institution into that benefice. And this he is to do two times more, if not received, namely, every third or every fifth day, according to the time given in the *duplex querela*. But if he cannot come to the presence of the bishop, he is to protest his readiness to receive his admission and to subscribe as aforesaid, and to have at least two witnesses thereof.

If the bishop shall not do the clerk justice within the time limited, then, after the expiration thereof, the party presented is to take care that the bishop be cited according to the tenor of the *duplex querela*.

If the person that is to cite the bishop cannot come to his presence, he is to signify to some of the bishop's servants that he has a *duplex querela* at the instance of such a clerk presented to such a church, to be by him executed, and to desire that he may come to the presence of the bishop. If he may not come to the bishop's presence so that he cannot cite him, the presentee is to stay till the day on which the bishop should appear had he been cited; at which time he is to be called, and if he appear not by himself or proctor, a citation *viis et modis* is to be decreed, which is to be executed personally if the bishop may be spoken with, and if not, then by affixing it to the outward doors of the bishop's palace, or of the house where the bishop resides, or of his cathedral church.

After the bishop is cited, whether by the first or second mandate, the person citing is to certify to the clerk or his proctor by his letters, or by subscribing upon the backside of the mandate, the day of executing the monition to institute, and the inhibition, the several days of the presentee's asking admission, and the day of his citing the bishop; and if the bishop refuse expressly to admit, that is also to be certified.

If the bishop appear not at the day, upon the petition of the presentee's proctor, the bishop being thrice called is by the judge pronounced contumacious; and as a punishment of his con-

tumacy, the judge does pronounce the right of instituting the presentee to his benefice to be devolved to the superior judge, and does decree that the clerk shall be instituted, and that he will write to the archdeacon of the diocese where the church is, or his official, commanding him to induct him.

Then the clerk is remitted (if the proceedings be in the Court of Arches or Audience) to the archbishop to examine him; and the archbishop, approving of him, returns him with his *fiat institutio* to the judge; who, before he institutes, is wont to require a bond of the presentee to save him harmless on that account.

But if the bishop appears, and alleges some just cause why he refused the clerk, then they are to proceed to the trial of that as in other summary causes.

If the cause alleged by the bishop be not proved, the judge pronounces as before for his own jurisdiction, and the bishop is to be condemned in expenses; and so if he alleges an insufficient cause, as that the church is litigious, for this he ought to have tried.

If the bishop will not defend the suit the pretended incumbent may do it, and allege that the church is full of himself; but then the judge will first pronounce sentence for his own jurisdiction, because the bishop has alleged nothing to oppose it. But if the bishop will allow such incumbent to defend the suit in his own name, then the judge cannot decree for his own jurisdiction, until the cause is determined (*y*).

And this way of proceeding in this case against a bishop is allowed of by the common law, and no prohibition lies for the bishop (*z*).

Advantages
of.

Which course of proceeding in the ecclesiastical court is the most proper remedy that the clerk can use in case he be refused by the bishop upon the account of any personal fault or defect, not only because by such course the clerk in a short time, at less charge and less hazard of losing his living by errors (which are easily fallen into at common law), may gain institution, but also because, although his patron bring his action at common law for refusing his clerk for crime or insufficiency, such cause of refusal shall be tried by a spiritual judge, to wit, if a bishop refuse, by the metropolitan of the province (*a*). But this is not a proper remedy where another clerk has been instituted and inducted, though wrongfully; because he has then acquired a lay fee, of which the ecclesiastical court cannot deprive him, except for certain crimes (*b*).

(*y*) This somewhat archaic account is taken from Clarke, *Praxis*. tit. lxxxiv.—xciii.; Wats. c. 21, p. 231; 1 Ought. pp. 237—245. The procedure in the modern cases has been simplified.

(*z*) Wats. c. 21. p. 233.

(*a*) Wats. c. 21, p. 234; *Specot's case*, 3 Leon. p. 199.

(*b*) Wats. c. 21, p. 233; *Hutton's case*, Hob. p. 15.

And the ecclesiastical judge in this case is to make certificate of his judgment to the temporal court, upon which they may proceed to sentence in a *quare impedit* (c).

Probably the most important case of this kind ever tried in the spiritual court was that of Mr. Gorham against the Bishop of Exeter. But this case, on account of its extreme peculiarity, can scarcely form a precedent for any other. The Privy Council, which tribunal reversed the sentence of the Dean of the Arches, said :—

Gorham v. Bp. of Exeter.

“After the litigation had thus commenced, and Mr. Gorham had called upon the bishop to state why institution was refused, it became evident that the reasons must be considered upon legal principles, and it was perhaps reasonably to be expected that both parties would require a strict and formal proceeding, in which what was the particular unsound doctrine imputed to Mr. Gorham would have been distinctly alleged which constituted his alleged offence.

“Unfortunately this course was not adopted. The bishop proceeded by act on petition; and in his act on petition he stated his charge against Mr. Gorham, and alleged ‘that it appeared to him, in the course of the examination, that Mr. Gorham was of unsound doctrine respecting that great and fundamental point of baptism, inasmuch as Mr. Gorham held, and persisted in holding, that spiritual regeneration is not given or conferred in that holy sacrament,—in particular, that infants are not made members of Christ and the children of God,—contrary to the plain teaching of the church of England in her Articles and Liturgy, and especially contrary to divers offices of Baptism, the office of Confirmation, and the Catechism, severally contained in the Book of Common Prayer and administration of the Sacraments and other rites and ceremonies of the church, according to the use of the united church of England and Ireland.’

“In part supply of proof of the premises, the bishop referred to a book written and caused to be printed and published by Mr. Gorham, containing amongst other things the several questions put by the bishop to Mr. Gorham in the course of the examination, and Mr. Gorham’s several answers to the same questions.

“The inconvenience of this course of proceeding is so great and the difficulty of coming to a right conclusion is thereby so unnecessarily increased, that in our opinion the judge below would have been well justified in refusing to pronounce any opinion upon the case as appearing upon such pleadings; and in requiring the parties, even at the last moment, to bring forth the case in a regular manner by plea and proof.

“The case comes before us in precisely the same state; and although the counsel on both sides have used their best endeavours to remove the vagueness and uncertainty found in the pleadings, as well as in the examination, and have thereby

much assisted us, they have not been able entirely to remove the difficulty" (a).

Later cases.

In *Willis v. The Bishop of Oxford* (b) Lord Penzance required the proceedings to be by plea and proof. The case, however, never came to a hearing. Besides that case, there have been in recent times, the cases of *Walsh v. The Bishop of Lincoln* (c), which was stayed as the clerk patron was also proceeding in *quare impedit*, and *Marriner v. The Bishop of Bath and Wells* (d) in which the clerk failed in the Court of Arches and in the Privy Council. A more recent case still is *Boyer v. The Bishop of Norwich* (e).

SECT. 7.—*Remedies of Patrons.*

We have next to consider the remedies which the law affords to the patron whose presentation of a clerk is litigated or refused on the ground of his having no right to present—

Trial of *jus patronatûs*.

1. The trial in the spiritual court of *jus patronatûs*.

2. The trial in the temporal court of *quare impedit*.

When church is litigious.

If two patrons present to one and the same church by several titles, the church is become litigious; because the bishop knows not which clerk to admit; and it seems that the church is not less litigious, though they both present the same person (f); because when the bishop admits him as the clerk of the one, he puts the other out of possession, and consequently, to his action; and the bishop becomes a disturber, if he who is put out of possession prove to have the better title (g).

But if two joint tenants or tenants in common present several clerks, this does not make the church litigious; for the bishop may admit the clerk of which he pleases; or if they do not agree and join in presenting a clerk within the six months, the bishop may collate (h).

Also where one patron does present his clerk before any other has presented, the church is not yet litigious; therefore if the bishop does refuse him, he is a disturber: and though another should after present, whereby the church then does become litigious, yet that will not excuse the bishop from being a disturber, if the first patron be upon trial found to have the better title; nor can he have the benefit of lapse, though no action be brought against him, which makes it safe for the bishop to receive him that comes first. But then a question may be made, how can a

(a) Moore's Special Report, pp. 459—461.

(b) 2 P. D. p. 192.

(c) L. R. 4 Adm. & Eccl. p. 242.

(d) 1893, P. p. 145.

(e) 1892, P. p. 41; 1892, A. C. p. 417.

(f) But in *Att.-Gen. v. Sudell*, Ch. Pre. p. 214, mortgagee and

mortgagor joined in presentation, and no objection was taken on that account.

(g) Degge, pt. 1, c. 3; 1 Roll. Rep. p. 236.

(h) Degge, pt. 1, c. 3; 1 Inst. p. 186 b; *Elvis v. Abp. of York*, Hob. p. 317.

church (the bishop acting thus safely for himself) ever become litigious? and how can it be truly said, that the bishop may justly refuse both clerks upon account of two several patrons making their several presentments to him, unless the presentees should happen to tender their presentments at one and the same time, which is not to be supposed? In answer to which,—It is true that if the bishop unjustly refuses the clerk of the true patron before any other presentment is made, although the church by another person's presenting after does become litigious, he will not be excused (the true patron prevailing at law) from being a disturber; but there is a great difference betwixt the bishop's suspending the admission and institution of a clerk, and his absolute refusal of him. A bishop is not bound instantly upon the presentment tendered to admit, if he has other business in hand, but may appoint the clerk to repair to him at another time to receive admission and institution. And when a person is presented to him, he may take competent time to examine the sufficiency of the person, and inquire and inform himself of his conversation—twenty-eight days by the 95th canon of 1603 (*i*). And by a hasty admission of the clerk of a disturber, the bishop might do great wrong in surprising other patrons that have right: and the law does not so hasten the bishop's proceeding, but that he may take convenient time to examine the clerk, that other pretenders may take notice of the vacancy (*j*). In the case of *Elvis v. Archbishop of York* (*k*), excellent rules are given “to show how the common law hath provided for the safety of the ordinary against disturbance, if he will not exceed his office, nor maintain parts, but carry himself indifferently amongst them that pretend to the patronage of the church as he ought to do, being in a sort a judge amongst them.”

But in case the patron fears that the bishop will admit another clerk, or be not yet resolved of his clerk, he may enter a *caveat* with the bishop not to admit the clerk of any other; and though this do not so bind up the bishop that he cannot admit the clerk of another person, yet if the bishop will presume to do it without a *jus patronatus*, he may bring himself under several inconveniences (*l*).

But a *caveat* entered during the life of the incumbent is of no force. This was resolved in the case of *Hutchins v. Glover* (15 Jac. 1), where the *caveat* was entered when the incumbent lay *in extremis*; and it had been declared in the spiritual court, that the institution afterwards given was void; for so is the rule of the canon and civil law, that a *caveat* may be entered where a person fears a future damage: but in this particular it is of no

(*i*) Serj. Hill's MSS.

(*j*) Wats. c. 20, p. 228; Degge, pt. 1, c. 3.

(*k*) Hob. p. 317. See also Lind.

p. 138 b; and *Hellwayes v. Abp. of York*, W. Jones, p. 4.

(*l*) Degge, pt. 1, c. 3.

force, because contradicted by the common law. However, where such suspicion is, that a title may probably be usurped upon an avoidance, it is a safe and advisable course to enter a *caveat* before the incumbent dies; which will be a restraint upon the ordinary from admitting any clerk hastily, though not in law, yet in equity and prudence (*m*).

But nevertheless an admission contrary to the *caveat* entered is good in law; that is to say, the admission, institution, and induction thereupon shall stand to all intents and purposes by the rules of the common law: in the eye of which the *caveat* is said to be only a caution for the information of the court (like a *caveat* entered in Chancery against the passing of a patent, or formerly in the Common Pleas against the levying of a fine); but that it does not preserve the right untouched, so as to null all subsequent proceedings; nor has it ever been determined, that a bishop became a disturber by giving institution without regard to a *caveat*; on the contrary, it was said by Coke and Doderidge, that they have nothing to do with a *caveat* in the common law (*n*).

Procedure on. Now the church being become litigious, the bishop in such case, in order to secure himself, ought to award a *jus patronatûs* to inquire of the right; which is merely an inquest of office, in nature of a writ *de proprietate probandâ* (*o*).

And this process is part of the ancient inquisition, that we read of in our elder constitutions and records; which includes, not only an inquiry into the points immediately relating to the right of patronage, but also into the qualifications of the persons presented, and such other heads as the bishop thought it proper for him to be informed of. And this inquisition (however now grown to be occasional only, when churches happen to be litigious) seems anciently to have been issued of course, upon every presentation made, and antecedent to the admission and institution thereupon (*p*).

It has been a question, whether the bishop is bound to sue the *jus patronatûs* at his own cost and peril, or only at the prayer, and at the cost of the party that prays it, or of both parties: but the better opinion seems to be, and so is the practice, that the same is to be sued at the prayer and at the cost of one of the parties that prays it, or of both the parties if they join (*q*).

And if the bishop refuses to award it accordingly, though he may not be sued in the spiritual court, yet he thereby brings upon himself divers inconveniences: he becomes a disturber; and he hinders the lapse, if the clerk is not admitted in six months; and (as Hobart held) if such patron makes good his title by due form of law, and did not name the bishop in the

(*m*) Cro. Jac. p. 463; Gibs. p. 778.

(*n*) Gibs. p. 778.

(*o*) Degge, pt. 1, c. 3; *Stanhope*
v. *Bp. of Lincoln*, Hob. p. 242.

(*p*) Gibs. p. 778.

(*q*) Degge, pt. 1, c. 3; Wats. c. 12,
p. 113; c. 21, p. 235 (34 H. 6, pp.
12 a, 38 b).

quare impedit, he may have an action upon the case against the bishop, and recover the costs and damages he hath sustained by reason of a wrongful admission of the bishop, without the awarding of a *jus patronatûs* as aforesaid (*r*). But if the bishop happens to admit him who upon trial appears to have the better title, then the other is without all remedy against the bishop (*s*). For it is necessary to show a title in the plaintiff in order to prove a tort in the bishop. But this is at the peril of the bishop (*t*).

Also either of the contending parties may demand a *jus patronatûs* singly (*u*).

But in case the bishop delay to admit the true patron's clerk, he may sue a *duplex querela* out of the Arches, to command the bishop to admit his clerk (*x*). But the bishop may return, if the truth be so, that the church is litigious, and that he cannot admit the clerk till the right be determined in a *jus patronatûs*; which will excuse him (*y*).

The *jus patronatûs* being awarded, is to be executed according to the form of proceeding in the ecclesiastical courts, which is thus:

The bishop, if he pleases, may sit himself as judge; but the usual way is by commission issued to his chancellor, or to such other person or persons as he shall judge proper, skilled in the canon and ecclesiastical laws (*z*).

These commissioners the bishop appoints to sit in the void church on a certain day; and decrees a monition against the patrons presenting and the clerk presented, to be present there at the day appointed, to see the proceedings (*a*).

Also the bishop is to decree, and send forth a public edict, against all having or pretending to have any interest or right of presenting to the vacant church, to appear at the day and place appointed, to show their right. And this public edict is to be affixed to the door of the void church in time of divine service (*b*).

And at the day appointed for this inquiry, the person or persons executing the aforesaid mandates or citations are to make oath of the due execution thereof; or the execution of them may be certified under some authentic seal, as of the archdeacon or commissary (*c*).

Against which day the bishop is also to summon a jury for this purpose by way of citation; which jury is to consist of six clerks and six laymen, that live near to the void church; or of as many more as the bishop pleases, the proportion being observed

(*r*) *Elvis v. Abp. of York*, Hob. p. 318.

(*s*) *Gibs.* p. 778; *Degge*, pt. 1, c. 3; *Wats.* c. 12, p. 113.

(*t*) 34 H. 6, p. 11 b.

(*u*) *Gibs.* p. 778.

(*x*) *Vide supra*, p. 328.

(*y*) *Degge*, pt. 1, c. 3.

(*z*) *Ibid.*

(*a*) *Clarke*, *Praxis*, tit. xoviii.

(*b*) *Ibid.*

(*c*) *Clarke*, *Praxis*, tit. c.

of clergy and laity, that there be as many of the one sort as of the other (*d*).

When the commissioners are set, they are to give directions to open the court, and the commission is presented, and read.

After which, the parties cited, and those of the jury are to be publicly called; and if any of the jury appear not, being duly summoned, they may be punished, that is to say, the clergymen by sequestration, and the laymen (anciently) by excommunication, and so be compelled to appear (*e*).

But if twelve of the jury appear, that is, six of each sort, it is sufficient (*f*).

And if others cited appear not, they are to be pronounced contumacious; and the proceedings are to go on notwithstanding, and *in penam contumacie* of them that do not appear (*g*).

If six clergymen and six laymen appear to be of the jury, which is the competent number, they are to be sworn faithfully to inquire of the articles; and in swearing them, first a clerk, then a layman is to be sworn, till a jury of twelve or more is made up (*h*).

Which articles are to contain the particulars about which the jury are to inquire, namely—1. Whether the church be void, and how it became void. 2. Who presented at the last preceding avoidance, and at the two foregoing avoidances. 3. Whether the persons presenting presented in their own right. 4. In whom the inheritance of the advowson is, and who ought to present to the void turn. 5. Whether any of the clerks presented be known or suspected to be guilty of any crime, rendering him incapable of admission to the said benefice; as heresy, simony, perjury, adultery, drunkenness or such like (*i*).

Then the counsel and advocates of both parties are to show their respective clients' titles, and to produce their evidences, and prove the same (*k*).

And after the evidence is given on both sides, and counsel fully heard, the jury may give their verdict at any time the same day; or if the cause be doubtful, the judge may assign them a longer time for to consider of the matter, and assign also a place where they shall give their verdict (*l*).

And according to the verdict given, the bishop admits and institutes the person in whom the right is found. Not that he is absolutely bound to do this, or that the admission and institution of another is void in law; but this, generally speaking,

(*d*) Clarke, Praxis, tit. xviii.; Wats. c. 21, p. 237.

(*e*) Clarke, Praxis, tit. c.; Wats. c. 21, p. 237.

(*f*) Clarke, Praxis, tit. c.

(*g*) Ibid.

(*h*) Clarke, Praxis, tit. c.; Wats. c. 21, p. 237.

(*i*) Clarke, Praxis, tit. xcix.; Wats. c. 21, p. 236.

(*k*) Clarke, Praxis, tit. c.

(*l*) Ibid.

is the fairest and most impartial way ; and the bishop, by doing otherwise, brings upon himself the inconveniences which accrue upon the refusal to award a *jus patronatûs* (m).

But suppose the jury will not agree on their verdict, and the one half be for the one patron, and the other half for the other patron ; or that they refuse to give any verdict at all ; or if they find a special verdict, as it seems that they may ; or if (where two patrons have each a *jus patronatûs*) there is a verdict in favour of each patron ; it seems in these cases that the bishop (inasmuch as he has done his duty) may refuse both, without subjecting himself to any of the said inconveniences ; though it is affirmed by some, that in such cases he may award a second *jus patronatûs* (n).

And it is to be observed, that after a verdict found in a *jus patronatûs* for the patron, the patron must again request the bishop to admit his clerk ; otherwise, if the church lapse after six months, the bishop may collate (o). But the Year Book says, that the clerk, and not the patron, is to make the request (p).

It is to be observed further, that a church may again become litigious, if after verdict given upon a *jus patronatûs*, another clerk is presented by a patron whose right was not discussed in the *jus patronatûs*, before admission is requested of any clerk by him for whom the verdict was found. In this case a new *jus patronatûs* upon request is to be awarded. But if one has presented, and his title is found upon a *jus patronatûs*, and he then requests the bishop to have his clerk admitted, and afterwards another presents, in this case the bishop should for his safety admit the clerk of him for whom the verdict is found, because otherwise the church becomes litigious by his delay, which will make him a disturber ; and if he does not admit, but suffers lapse to come to himself, and then collates, it is said he is a disturber against both presenters. And in this case, in an action brought against the bishop, and the special matter being made appear by the pleading, the issue shall be, whether he, for whom the title was found, did sue to have his clerk admitted, and whether the second presented so hastily to the bishop, that he could not admit the clerk of the first before the second presentation was made (q).

But after all, the effect of this suit is no more but for the Effect of. bishop's security, that he may avoid being a disturber, for the verdict of this jury is a sufficient warrant for the bishop to admit and institute his clerk, for whose title the verdict is given ; and the bishop for so doing shall never be made a disturber, though the other patron against whom the verdict is

(m) Degge, pt. 1, c. 3 ; Wats. c. 21, p. 237.

(n) Gibs. p. 779 ; Wats. c. 21, p. 237 ; Degge, pt. 1, c. 3. There is an account of one of these trials at Leeds on Feb. 1, 1723, in Ralph

Thoresby's Diary, Vol. II., p. 353.

(o) Degge, pt. 1, c. 3.

(p) 34 Hen. 6, p. 12 a.

(q) Wats. c. 20, p. 228 ; Degge, pt. 1, c. 3 ; 21 Hen. 6, p. 44.

given shall after recover in a *quare impedit* or other action: but this does not at all bind the title or right of the party; for that must be done by some of the methods hereafter following (*r*). But per Littleton, this inquiry is strong evidence for the party in a *quare impedit*, as well as advantageous to put him in possession (*s*).

If the bishop pleases he may inquire, as was once the custom, of the right of every person that presents a clerk to him by awarding a "*jus patronatûs*" to him before he admits his clerk (*t*).

Remedy for
the patron in
the temporal
court by *quare
impedit*.

If the patron finds himself aggrieved by the ordinary's refusal of his clerk, he may have his remedy by *quare impedit* in the temporal court.

And in such case the ordinary must show the cause of his refusal specially and directly (not only that he is a schismatic, or heretic, for instance, but the particular schismatical acts or heretical opinions that he is charged withal must be set forth). For the examination of the bishop does not finally conclude the plaintiff; and without showing specially, the proper court cannot inquire and resolve whether the refusal be just or no. And if the cause of refusal be spiritual, the court shall write to the metropolitan to certify thereof, or if the cause be temporal and sufficient in law (which the temporal court shall decide), the same may be traversed, and an issue thereupon joined and tried by the country (*u*).

Plea by
bishop in —.

But in case of refusal for insufficiency in learning, it was adjudged in parliament in the case of *The Bishop of Exeter v. Hele*, to be a good plea on the part of the bishop, that the presentee was a person not sufficient or capable in learning to have the said church; and there resolved, that he need not set forth in what kinds of learning, or to what degrees he was defective (*x*).

Ancient writs.

There were formerly other remedies for patrons, such as writs of right of advowson, *quare incumbravit*, &c.; but these were abolished by 3 & 4 Will. 4, c. 27. By 23 & 24 Vict. c. 126, s. 26, a further alteration was made in the practice by abolishing the special writ in *quare impedit*. Now these actions are tried like ordinary actions in the High Court of Justice (*y*).

Limitation of
the time with-
in which a
quare impedit

For a long time there was no limitation as to the time within which actions concerning advowsons might be brought. For the old Statute of Limitations (*z*) was declared not to extend to any

- (*r*) Degge, pt. 1, c. 3.
- (*s*) 34 Hen. 6, p. 38 b.
- (*t*) Wats. c. 21, p. 236.
- (*u*) 2 Inst. p. 631; *Specot's case*, 5 Co. p. 58.
- (*x*) 2 Salk. p. 539; Gibs. p. 807. See *Bp. of Exeter v. Marshall*, L. R., 3 H. L. 17, and *supra*, sect. 5; p. 323.
- (*y*) For the law of pleading in these cases, see Stephen's Black-

stone's Commentaries (ed. 1868), vol. iii. pp. 716—721; Stephen on Pleading (ed. 1866), pp. 17—41; Wentworth on Pleading, vol. x., pp. 67—107; Clift, Entries, p. 607; Rastall, Entries, p. 532; Coke, Entries (ed. 1614), pp. 468—524; Mallory on Quare Impedit: *Willion v. Berkley*, Flou. p. 243; *Rex v. Abp. of York*, 1 A. & E. p. 394.

(*z*) 32 Hen. 8, c. 2.

writ of right of advowson, *quare impedit*, assize of *darrein presentment*, or *jus patronatus*. It was doubtful whether the Nullum Tempus Act, 9 Geo. 3, c. 16, applied to advowsons (*a*). By 3 & 4 Will. 4, c. 27, s. 30, "No person shall bring any *quare impedit*, or other action or other suit, to enforce a right to present or bestow any church, vicarage or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned, that is to say the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years." By sect. 31, it is provided that incumbencies after lapse are to be reckoned within the period, but not incumbencies after promotions to bishoprics. By s. 32, persons claiming an advowson in remainder after an estate tail, which might have been barred by the owner of the estate tail, shall be considered to claim through such owner. By s. 33, no person shall bring a *quare impedit* or other action or suit after 100 years, "from the time at which a clerk shall have obtained possession of such benefice" adversely to the right of such person or of some person through whom he claims or of some person entitled to a preceding estate or a share in or alternate right of presentation held or derived under the same title, "unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming," or of such others as before mentioned. By s. 34, where the right of bringing an action is barred under this act, the right and title of the person whose action is so barred is absolutely extinguished.

may be brought.

In *quare impedit* the bishop cannot counterplead the patron's title by setting up a title in the Queen by lapse (*b*).

In *quare impedit* to recover the presentation to the church of K., the advowson whereof was claimed to be part of the temporalities of the bishop of M., a case purporting to be a case stated for the opinion of counsel on the part of A., a former bishop of M., touching the right of presentation to that church, and found in the family mansion of A.'s descendants, was tendered in evidence. Holden admissible as against the successors of the bishop in the same see. It was holden in this case that a deed relating to the same church and brought from the same custody was admissible in evidence against the same party.

Bishop cannot set up title in crown by lapse.

Evidence in *quare impedit*.

(*a*) *Gibson v. Clark*, 1 J. & W. p. 159.

(*b*) *Storie v. Bp. of Winchester*, 19 L. J., C. P. p. 217 (1850); 9 C. B. p. 62.

In the same case, a plaintiff in *quare impedit*, after tracing his title through various steps and averring the death of W., who had been shown to be a joint tenant with the plaintiff for a term of years in an advowson, alleged, "Whereupon and whereby the plaintiff became and still is possessed of the said advowson as of an advowson in gross for the remainder of the said term so therefore granted." The defendant pleaded that he, as bishop of M., was seised of the advowson in gross in right of his see, without this that the plaintiff was possessed of the advowson in manner and form as the plaintiff had alleged. Holden, that a fine of the advowson in question levied in 1 Jac. 2, by one whose estate the plaintiff had, was not admissible in evidence under this or any similar issue. It was ruled that, if admitted, it ought not to be left to the jury to say whether the fine in question barred the action of *quare impedit* (c).

Statutes as to
quare impedit.

It seems expedient to make some reference to the old statutes on the writ of *quare impedit*.

The earliest statutes, those of 52 Hen. 3, c. 12, and 3 Edw. 1, c. 51, have been repealed.

13 Edw. 1,
st. 1, c. 5.

By 13 Edw. 1, st. 1, c. 5, s. 1, "Whereas of advowsons of churches there be but three original writs, that is to say, one writ of right and two of possession, which be *darrein presentment* and *quare impedit*; and hitherto it hath been used in the realm, that when any having no right to present, had presented to any church, whose clerk was admitted, he that was very patron could not recover his advowson, but only by a writ of right, which should be tried by battel or by great assise; whereby heirs within age, by fraud, or else by negligence of their wardens, and heirs both of great and mean estate, by negligence or fraud of tenants by the curtesy, women tenants in dower, or otherwise for term of life, or for years, or in fee-tail, were many times disinherited of their advowson, or at least which was the better for them were driven to their writ of right, in which case hitherto they were utterly disinherited. It is provided that such presentments shall not be so prejudicial to the right heirs, or to them unto whom such advowsons ought to revert after the death of any persons. For as often as any, having no right, doth present during the time that such heirs are in ward, or during the estates of tenants in dower, by the curtesy, or otherwise for term of life, or of years, or in tail, at the next avoidance, when the heir is come to full age, or when after the death of the tenants before-named, the advowson shall revert unto the heir being of full age, he shall have such action by writ of advowson possessory, as the last ancestor of such an heir should have had at the last avoidance happening in his time being, of full age before his death, or before the demise was made for term of life,

(c) *Bp. of Meath v. The Marquis of Exeter*, 4 Cl. & F. p. 445 (1835).
A later Irish case in *quare impedit*

is *Whaley v. Carlisle*, 17 Irish C. L. R., and on appeal, L. R., 2 H. L. p. 391.

or in fee-tail, as before is said : The same shall be observed in presentments made unto churches, being of the inheritance of wives, what time they shall be under the power of their husbands, which must be aided by this statute by the remedy aforesaid. Also religious men, as bishops, archdeacons, parsons of churches, and other spiritual men shall be aided by this statute, in case any having no right to present do present unto churches belonging to prelacies, spiritual dignities, parsonages, or to houses of religion, what time such houses, prelacies, spiritual dignities, or parsonages be vacant.

“Neither shall this act be so largely understood that such persons, for whose remedy this statute was ordained shall have the recovery aforesaid surmising that guardians of heirs, tenants in tail, by the curtesy, tenants in dower, for term of life, or for years, or husbands, which faintly have defended pleas moved by them, or against them ; because the judgments given in the king’s courts shall not be adnulled by this statute, the judgment shall stand in his force until it be reversed in the court of the king as erroneous, if error be found ; or by assise of *darrein presentment*, or by inquest by a writ of *quare impedit*, if it be passed, or be adnulled by attainr or certification, which shall be freely granted. And from henceforth one form of pleading shall be observed among justices in writs of *darrein presentment* and *quare impedit*, in this respect, if the defendant allegeth plenarty of the church of his own presentation, the plea shall not fail by reason of the plenarty ; so that the writ be purchased within six months, though he cannot recover his presentation within the six months. (d).

“And where it chanceth that after the death of the ancestor of him that presented his clerk unto a church, the same advowson is assigned in dower to any woman, or to tenant by the curtesy, which do present, and after the death of such tenants the very heir is disturbed to present when the church is void ; it is provided that from henceforth it shall be in the election of the party disturbed, whether he will sue a writ of *quare impedit* or of *darrein presentment*. The same shall be observed in advowsons demised for term of life, or years, or in fee-tail.

“And from henceforth in writs of *quare impedit* and *darrein presentment*, damages shall be awarded, that is to wit, if the time of six months pass by the disturbance of any, so that the bishop do confer to the church, and the very patron loseth his presentation for that time, damages shall be awarded for two years’ value of the church. And if the six months be not passed, but the presentment be deraigned within the said time, then damages shall be awarded to the half year’s value of the church. And if the disturber have not whereof he may recompense damages, in case where the bishop conferreth by lapse of time, he shall be punished by two years’ imprisonment. And if the advowson be

(d) The part omitted here comes in at p. 290, supra.

deraigned within the half year, yet the disturber shall be punished by the imprisonment of half a year.

“And from henceforth writs shall be granted for chapels, prebends, vicarages, hospitals, abbies, priories, and other houses which be of the advowsons of other men that have not been used to be granted before. And when the parson of any church is disturbed to demand tithes in the next parish by a writ of *indicavit*, the patron of the parson so disturbed shall have a writ to demand the advowson of the tithes being in demand; and when it is deraigned, then shall the plea pass in the court christian, as far forth as it is deraigned in the king’s court.”

When the church is full.

That where any having no Right to present, had presented.]—By this it appears that no plenarty does put the patron that has title to present out of possession, but only plenarty by presentation: but plenarty by collation does put him that had right to collate out of possession (*e*).

Had presented to any Church.]—This is intended of a church representative (*f*).

Whose Clerk was admitted.]—Albeit that admitted in its proper sense is, when the bishop upon examination finds him able, yet here it is taken for institution; because that before institution, the rightful patron is not put out of possession. And it is to be observed, that by the institution, the church, as to all common persons, is full as to the spirituality, that is, the cure of souls, which the bishop by the act of institution has committed to him; but before induction the parson has not the temporalities belonging to his rectory (*g*).

But the church is not full against the king before induction: because in the king’s case plenarty is to be intended of a full and complete plenarty, as well to the temporalities as to the spirituality (*g*).

And if there be an usurpation upon the king, by a complete plenarty, the king cannot present to the church before he has removed the incumbent by *quare impedit*, lest contentions might grow in the church between the several claimers of the benefice, to the disturbance or hindrance of divine service; and this was by the common law (*g*).

But in that case, the king is only put out of possession as to the bringing of an action; but the inheritance of the advowson is not devested out of him (*g*).

He that was very Patron could not recover his Advowson.]—At the common law, if a stranger had presented his clerk, and he had been admitted and instituted to a church, whereof any subject had been lawful patron: the patron had no other remedy to recover his advowson, but a writ of right of advowson, wherein the incumbent was not to be removed. And so it was at the common law, if an usurpation had been had upon an infant or feme covert, having an advowson by descent, or upon

(*e*) 1 Inst. p. 344; 2 Inst. p. 357. (*f*) 2 Inst. p. 357. (*g*) Ibid.

tenant for life, or the like; the infant, feme covert, and he in the reversion, were driven to their writ of right of advowson; for at the common law, if the church were once full, the incumbent could not be removed, and plenarty generally was a good plea in a *quare impedit* or assize of *darrein presentment*, and the reason of this was, to the intent that the incumbent might quietly intend and apply himself to his spiritual charge; and the law did intend, that the bishop that had cure of souls within his diocese, would admit and institute an able man for the discharge of the spiritual function, and that the bishop would do right to every patron within his diocese. But at the common law, if any had usurped upon the king, and the presentee had been admitted, instituted, and inducted (for without induction the church had not been full against the king), the king might have removed him by *quare impedit*, and have been restored to his presentation; for therein the king has a prerogative, that *nullum tempus occurrit regi*; but the king could not present, for the plenarty barred him of that, neither could the king remove him any way but by action, to the end the church might be the more quiet in the meantime; neither did the king recover damages in his *quare impedit* at the common law. But this statute has altered the common law in all these cases (*h*).

It is provided, that such Presentments.]—The words foregoing, to which these have reference, extend only to heirs in ward; but these words are to be expounded of such presentments as are within the same mischief: and therefore this act extends to heirs of advowsons, though they may be out of ward (*i*).

Cases to which statute applies.

Shall not be so prejudicial to the right Heirs.]—This act relieves only infants that have advowsons by descent; for if an infant has an advowson by purchase he remains at the common law, and is not remedied by this act (*k*).

And this being a law that suppresses wrong, and advances right, does bind the king, though he be not named in the act (*k*).

Or to them unto whom such Advowsons ought to revert after the Death of any Persons.]—That is, to those heirs that have the reversion of the advowson by descent; but the heir of him in the remainder is not within the purview of this act (*k*).

After the Death of any Persons.]—That is, of tenant by the curtesy, tenant in dower, or otherwise for life, or for years, or in fee-tail (*k*).

The same shall be observed in Presentments made unto Churches being of the Inheritance of Wives.]—But if a feme covert has an advowson by purchase, and not by inheritance, she is not within the remedy of this act (*l*).

Also Religious Men, as Bishops, Archdeacons, Parsons of

(*h*) 1 Inst. p. 344; 2 Inst. p. 356;

(*k*) Ibid.

3 Black. Com. p. 244.

(*l*) 2 Inst. p. 359.

(*i*) 2 Inst. p. 358.

Churches, and other Spiritual Men shall be aided by this Statute.]—By this presentation and usurpation in time of vacation, albeit the freehold and inheritance is in abeyance; yet the usurper gains a fee-simple in the advowson; like as if one enters into lands during the vacation, and claims the same as his inheritance, he gains an inheritance by wrong. But yet as the dying seised of lands in that case during the vacation shall not take away the entry of the successor, no more shall the usurpation during the vacation take away the right of presentation when the church becomes void; and if he be disturbed, he shall have his *quare impedit* (m).

Plenary
what.

The Plea shall not fail by reason of the Plenary.]—By the common law, as hath been said, *plenarty* before the writ of *quare impedit* brought was a good plea, but *plenarty* hanging the writ was no bar at the common law; but now by this statute *plenarty* is no plea in a *quare impedit* or *darrein presentment*, unless it be by the space of six months before the *quare impedit* brought; for if the rightful patron bring his action within the six months, it is maintainable by this statute; which short purview does remedy many mischiefs at the common law (n).

But this act does not bind the king; for *plenarty* by the space of six months is no bar against him, for he may have his *quare impedit* when he will; and that, whether he claims in the right of his crown, or in the right of a subject (o) as in right of a ward (o).

So that the Writ be purchased within Six Months.]—And because this computation does concern the church, it is great reason that it shall be made according to the computation of the church, which churchmen do best know; and therefore the computation shall be made according to the calendar for one half year, and not accounting twenty-eight days to the month (o).

The very Heir is disturbed to present.—Hereby the heir in reversion is provided for, and not the lessor himself. And albeit tenant by curtesy, tenant in dower, tenant for life, or tenant in tail presented last; yet the heir to whom the reversion falls in possession, shall have by this branch an assise of *darrein presentment*, albeit the heir or his ancestor did not immediately present before (p).

Damages.

Damages shall be awarded.]—Before the making of this act, the plaintiff in a *quare impedit* recovered no damages, lest any profit the patron should take should savour of simony, which the common law did detest. And this is the cause that the king in a *quare impedit* recovers no damages; because he could recover none by the common law, and the king is not within the purview of this clause (q).

So that the Bishop do confer to the Church.]—Albeit the bishop

(m) 2 Inst. p. 359.

(n) 2 Inst. p. 360.

(o) Ibid.

(p) 2 Inst. p. 361.

(q) 2 Inst. p. 362.

has not collated, yet if he has the right of collation, the plaintiff shall, if he will, recover double damages within the meaning of this act. But if, notwithstanding the bishop's title to collate, the church remaineth void, the plaintiff may recover his presentation; and if he does, the damages shall be only for half a year; in which case he hath his election, either to lose his presentation and have double damages, or to have his presentation with single damages (*r*).

For Two Years' Value of the Church.]—And this shall be accounted according to the very true value, as the same may be letten (*s*).

Shall have a Writ to demand the Advowson of the Tithes.]—By the common law, if the incumbent of one patron demanded tithes against the incumbent of another patron, the writ of *indicavit* did lie; for that the right of the patronage should come in question; for by the presentation of the patron, his incumbent is to have the tithes, which are the profits of the church. And in a writ of right of advowson, the patron used to allege the esplees (or profits) in his incumbent in taking of the great and small tithes; and therefore if the right of tithes came in question, that concerned the right of advowson, the writ of *indicavit* did lie (*t*).

Consequential remedies.

The mischief before this statute was, that seeing the right of tithes could not be tried between the two persons after the *indicavit* granted, the person prohibited was without remedy for trial of the right of tithes; and therefore this act does give the patron, whose clerk is prohibited, a writ of right of advowson of tithes; and if the right be tried for the demandant, the cause shall be removed into the court christian (*u*).

But what if the patron hath but an estate for life, so as he cannot have this writ of right of advowson; what remedy shall be had for trial of the right of tithes in this case? It seems that by construction of this statute, the defendant in the *indicavit* appearing upon the attachment, shall plead to the right of the tithes in the king's court, or otherwise he shall be without remedy (*u*).

When a stranger that has no right presents to a church and his clerk is admitted and instituted, he is said to be an usurper, and the wrongful act that he has done is called an usurpation. This is the definition given by Lord Coke; and with regard to the first step towards an usurpation which he there mentions, viz., presenting, it is to be observed, that a presentation made by a stranger, if it be void in law (as in the case of simony, or of a presentation to a donative, or to a church that is full),

Usurpation.

(*r*) 2 Inst. p. 362. In such case no damages were given. See *Holt v. Holland*, 3 Lev. p. 59; and Serjt. Hill's MSS.

(*s*) 2 Inst. p. 363.

(*t*) 2 Inst. p. 364.

(*u*) Ibid.

makes no usurpation against the rightful patron; as neither does a presentation where between the usurper and the person upon whom the usurpation is made there is privity in blood, as in the case of coparceners; or privity in the estate, as between lessor and lessee, grantor and grantee, joint tenants, and tenants in common. In none of these cases is the act of presenting the foundation or commencement of what the law calls an usurpation. And as to the second step mentioned in the aforesaid definition (viz., being admitted and instituted), it must be an admission upon a presentation made; and by consequence not a collation by the bishop, nor the institution of a clerk who, pretending himself to be patron of a church that is void, prays the ordinary to admit and institute him, and (without a presentation in form) obtains institution (x).

In time of
peace.

Also it is said that no usurpation in time of war puts the right patron out of possession, albeit the incumbent come in by institution and induction; and time of war does not only give privilege to them that be in war, but to all others within the kingdom; and although the admission and institution be in time of peace, yet if the presentment were in time of war, it puts not the right patron out of possession (y).

And the reason of this seems to have been because anciently in the time of war the courts were shut up, so that the true patron might not have an opportunity to bring his *quare impedit* within the six months.

The pleadings in *quare impedit*, down at least to the new practice under the Judicature Act, have always averred that the previous presentations relied on in evidence of possession were made in time of peace (z).

Completed
by peaceable
possession for
six months.

For to complete an usurpation, the usurper must be in peaceable possession for six months. To sum up: Since the statute of 13 Edw. 1, st. 1, c. 5, to enable the usurper to plead plenarty against the true patron, so as to debar him absolutely of that turn, it is not enough that the usurper do present duly and his presentee be admitted, instituted and inducted, but also that the church has been full by the space of six months, and no writ brought to recover the presentation; for within the six months the patron may bring his action of *quare impedit*, and recover his presentment and possession of the advowson; but if this action be not brought within the six months the incumbent is in for life, and the usurpation complete.

And heretofore, if an usurper presented, and the clerk was instituted and inducted, and the true patron did not bring his *quare impedit* within six months, in some cases he did not only

(x) Gibs. p. 782.

(y) 1 Inst. p. 249; Wats. c. 20,
pp. 155, 222.

(z) Mallory on Quare Impedit;
Walsh v. Bp. of Lincoln, L. R. 10
C. P. p. 518.

lose his turn for that time, but his presentation was gone for ever (a).

But the statute of 7 Anne, c. 18, reciting that "Forasmuch as the pleading in a *quare impedit* is found very difficult, whereby many patrons are either defeated of their rights of presentation, or put to great charge and trouble to recover their right," enacts that "no usurpation upon any avoidance in any church, vicarage or other ecclesiastical promotion, shall displace the estate or interest of any person entitled to the advowson or patronage thereof, or turn it to a right; but he or she that would have had a right if no usurpation had been, may present or maintain his or her *quare impedit* upon the next or any other avoidance (if disturbed) notwithstanding such usurpation" (b).

14 Car. 2, c. 25, restored all advowsons, &c., usurped by the Long Parliament, to their lawful owners.

By 20 Geo. 2, c. 52, All titles and suits and actions of *quare impedit* were excepted out of the general pardon granted by that act to all persons concerned in the late rebellion.

When by the judgment in a *quare impedit* the inheritance, estate or interest of the patron that presented is to be divested, such patron ought to be named in the writ; because the patronage should else be recovered against him who had nothing in the patronage, namely, the clerk; and it is not reason that he who is patron should be dispossessed and ousted of his patronage when he is a stranger and not party to the action, especially when he may be made a party (c).

Aliter where the presentation alone is to be recovered (d). When the patron was omitted, the proper course was for the incumbent to plead in abatement (e).

And not only the patron, but also his incumbent, must be named in the writ; for if an incumbent at the time of purchasing the original writ be admitted and instituted at the presentation of any one, although the ordinary and his patron be named, yet such incumbent that is not mentioned shall not be removed, but only the patronage recovered (f). *Quia res inter alios acta alteri nocere non debet* (g).

And in some cases it is necessary also to name the ordinary in the writ; for if the patron be disturbed in presenting, and the church be not filled, the ordinary is to be named in the writ, or else he will collate, hanging the suit, by lapse; whereas if he be named, he must either disclaim, and then judgment may be had against him, or else he must plead, and so allow himself to

(a) *Elvis v. Abp. of York*, Hob. p. 322. See *Ashby v. White*, *Ld. Raym.* p. 954.

(b) *Wats.* c. 7, p. 65.

(c) *Wats.* c. 24, p. 255; *Wincombe v. Pulestone*, Hob. p. 193; *Savile v. Thornton*, *Cro. Jac.* p. 651.

(d) *Hall v. Bp. of Bath and Wells*, *Savile*, p. 108; *Thornton v. Sir George Savill*, *Palm.* p. 311.

(e) *Elvis v. Abp. of York*, Hob. p. 317.

(f) *Wats.* c. 24, p. 258.

(g) *Boswell's case*, 6 Co. p. 51 b.

be a disturber, and being made party to the action he is barred of the advantage of lapse (*h*).

Nature of action.

Quare impedit is a possessory action, and therefore not to be maintained without a possession; for which reason the plaintiff must always declare upon a presentation made by himself or his ancestor, or one whose estate he has, or by the grantee of the next avoidance, or by his lessee for life or for years (*i*).

Teste of writ.

But yet the want thereof may be cured by verdict (*k*). Under the old law in all writs of *quare impedit* the teste of the writ ought to be made the very day the writ is taken out and not at any time before, and this by reason of the lapse (*l*). For if the writ abate, no new writ could be brought after the six months (*m*).

Presentation during suit.

By a constitution of Archbishop Langton, "If two are presented to one and the same church, the custody thereof shall be given to neither of them pending the suit. And if the right of collating to such church shall lapse to the bishop, in such case, lest either of the parties should be prejudiced by the bishop's collation, who shall afterwards carry his cause as to the right of patronage, it is decreed, that the bishop shall collate neither of those who have been presented to the same church for that turn, unless by consent of both the patrons" (*n*).

3 Edw. 1, c. 28.

And by 3 Edw. 1, c. 28, "None of the king's clerks, nor of any justicer from henceforth, shall receive the presentment of any church, for the which any plea or debate is in the king's court, without special licence of the king; and that the king forbiddeth, upon pain to lose the church, and his service."

The mischief before which act was, that pending a suit for a church in the king's court, the one party or the other would present the chaplain of the king, or of some of the judges, the more to countenance the one party, and discourage the other: and at that time the mischief was greater, because if the clerk

(*h*) Wats. c. 24, p. 258; 1 Inst. p. 344 b.

(*i*) 3 Salk. p. 293; *Tuften v. Temple*, Vaugh. p. 8; *Reynoldson v. Bp. of London*, 3 Lev. p. 436; *Digby v. Fitzharbert*, Hob. p. 102; 1 Dow & Cl. p. 256. See exceptions to this rule, *Grocers' Co. v. Abp. of Canterbury*, 3 Wils. pp. 225, 231; *Farnworth v. Bp. of Chester*, 4 B. & C. p. 555; *Reynoldson v. Blake*, 1 Ld. Raym. p. 201.

(*k*) *Rex v. Bp. of Llandaff*, 2 Stra. p. 1006.

(*l*) Wats. c. 23, p. 254.

(*m*) *Sir Hugh Portman's case*, 7 Co. p. 27. For the practice of the courts of common law under the old law on this head, consult *Walwyn*

v. Bp. of Llandaff, 2 Wils. p. 233; *Barber v. Bp. of London*, 1 Black. H. p. 412, n.; Willes, p. 659; *Gully v. Bp. of Exeter*, 2 M. & P. p. 105; 4 Bing. p. 525; *Shepherd v. Bp. of Chester*, 4 M. & P. p. 130; 6 Bing. p. 435; *Thrale v. Bp. of London*, 1 Black. H. p. 376; *Rex v. Marquis of Stafford*, 3 T. R. p. 646; *Birch v. Bp. of Lichfield and Coventry*, 3 B. & P. p. 444; *Greenwood v. Bp. of London*, 1 Marsh. p. 292; 5 Taun. p. 727; *Shireburne v. Hitch* (in error), 1 Bro. P. C. 110; *Apperley v. Bp. of Hereford*, 3 Moo. & S. p. 102; *Tyrrell v. Jenner*, 3 M. & P. p. 648; 6 Bing. p. 283.

(*n*) Lind. p. 215.

of an usurper was instituted, the true patron had no remedy but by a writ of right of advowson (*o*).

And by 13 Edw. 1, st. 1, c. 49, it is enacted as follows: "The 13 Edw. 1,
chancellor, treasurer, justices, nor any of the king's counsel, no st. 1, c. 49.
clerk of the chancery, nor of the exchequer, nor of any justice or other officer, nor any of the king's house, clerk nor lay, shall not receive any church, nor advowson of a church, land, nor tene-ment in fee, by gift, nor by purchase, nor to farm, nor by cham-perty, nor otherwise, so long as the thing is in plea before us, or before any of our officers; nor shall take no reward thereof. And he that doth contrary to this act, either himself or by another, or make any bargain, shall be punished at the king's pleasure, as well he that purchaseth as he that doth sell."

Judgment being given, the effects thereof are, that he that recovers, recovers the advowson as well as the presentment, and by the very judgment absolutely given, there is this effect of the judgment, that the incumbent that was in a church when the writ was brought, if named in the writ, is actually removed; but if not named in the writ, he shall never be removed (*p*). Effect of judgment.

Another effect of a judgment given in a *quare impedit* is, that he for whom the judgment is given shall recover as well his damages, as his presentment and advowson, by the aforesaid statute of 13 Edw. 1, st. 1, c. 5 (*q*).

And the recoverer shall have a writ to the bishop to admit his clerk (*r*). Writ to the bishop to admit.

By a constitution of Archbishop Boniface, "If when a man hath recovered his right of patronage in the king's court, the king doth write to the bishop, or to any other who hath power to grant institution, that he admit the clerk presented by such person having so recovered as aforesaid; the clerk presented shall be freely admitted, if the benefice be vacant, and there be no other canonical impediment, that the patron be not injured. But if the benefice be not vacant, the prelate may excuse himself to the king or his justices, by answering, that because the benefice is not vacant, he cannot therefore fulfil the king's mandate. But the patron may, if he pleaseth, present again the person who is in possession; that so the right of him who hath so recovered may be declared for the future."

Or to any other who hath Power to grant Institution.—As the

(*o*) 2 Inst. p. 212.

(*p*) Wats. c. 28, p. 289; *Boswell's case*, 6 Co. p. 51 b; *Cort v. Bp. of St. David's*, Cro. Car. p. 318.

(*q*) Wats. c. 28, p. 292. The statutes, 3 Hen. 7, c. 10, and 4 & 5 Will. 4, c. 39, which made provision as to the costs in these actions, have now been repealed. See, on the construction of the last act, the cases of *Edwards v. Bp. of Exeter*, 6 Bing. N. C. p. 146; *Walsh v. Bp.*

of Lincoln, L. R. 10 C. P. p. 537.

(*r*) Wats. c. 28, p. 295. But when the bishop is an actual and not a mere formal litigant, it seems that the writ goes to the metropolitan. Mallory on *Quare Impedit*, pt. i. p. 178; pt. ii. p. 94. This course was adopted in *Marsshall v. Bp. of Exeter*, supra, p. 320; and *Walsh v. Bp. of Lincoln*, supra, p. 311.

dean, or archdeacon, or other such like: who may have such power by custom, prescription, or special privilege (*s*).

Shall be freely admitted.]—That is, without making any inquiry of the right of patronage; because it is enough that the king by his letters testifieth that he hath obtained the right of patronage in his court (*t*).

The King doth write to the Bishop.]—That is, by writ issuing out of his court. And if the bishop, upon receipt of the writ, did not admit the clerk; another writ used to issue, which was called the writ of *quare non admisit* (*u*).

Operates as an amotion.

And it is said, the very judgment in a *quare impedit* is an amotion of the incumbent, though he continue still the possession *de facto*; and if the plaintiff be instituted upon a writ to the bishop, the defendant cannot appeal; and if he does, a prohibition lies; because in this case the bishop acts as the king's minister, and not as a judge (*x*).

Injunction.

It should be noticed that where a dispute arose as to the right of the apparent patron to present (such right being contested on equitable grounds), the Court of Chancery restrained by injunction the bishop from presenting any person to the benefice till the suit had been decided (*y*).



SECT. 8.—*Admission, Institution and Induction.*

In this section we will consider:—

1. Admission.
2. Institution or Collation.
3. Induction.

Admission.

In a larger sense admission is sometimes used to include also institution, but more frequently, and properly, admission is taken to be when the bishop upon examination approves of the presentee as a fit person to serve the cure of the church to which he is presented, and institution is that act by which he commits to him the cure thereof (*z*).

And we find sometimes also the practice of investiture by the bishop in our ecclesiastical records, *ipsum instituit et investivit annulo suo*, which is frequently repeated in Archbishop Peccham's Register (and was in Bishop Gibson's time in use in the diocese of St. Asaph), and is mentioned as distinct from the admission, institution and induction (*a*). "*Admitto te habilem*," was the language of the bishop (*b*).

(*s*) Lind. p. 217.

(*t*) Ibid.

(*u*) Wats. c. 28, p. 302.

(*x*) 3 Salk. p. 293.

(*y*) *Greenlade v. Dare*, 17 Beav. p. 502.

(*z*) Wats. c. 15, p. 149.

(*a*) Gibbs. p. 808.

(*b*) 1 Inst. p. 244 a; *Wrighton v. Browne*, 3 Lev. p. 211; *Robinson v. Wooler*, 2 Roll. p. 199.

There is no difference between institution and collation as to the action itself, but this: that the bishop does not present to such livings as are in his own gift, but immediately institutes his clerk in much the same form as he or his chancellor institutes a clerk presented by any other patron. And as the bishop collates to benefices of his own gift *jure pleno*, so he does to those which fall to him by lapse (*c*).

Difference between institution and collation.

By Canon 40 of 1865, which is the old Canon of 1603 with the amendment that a declaration, in a new form, is substituted for an oath, it is provided as follows:—

“To avoid the detestable sin of simony, because buying and selling of spiritual and ecclesiastical functions, offices, promotions, dignities and livings, is execrable before God; therefore the archbishop, and all and every bishop or bishops, or any other person or persons, having authority to admit, institute, collate, install, or to confirm the election of any archbishop, bishop, or other person or persons to any spiritual or ecclesiastical function, dignity, promotion, title, office, jurisdiction, place, or benefice with cure or without cure, or to any ecclesiastical living whatsoever, shall before every such admission, institution, collation, installation or confirmation of election, respectively cause to be made by every person hereafter to be admitted, instituted, collated, installed, or confirmed in or to any archbishopric, bishopric, or other spiritual or ecclesiastical function, dignity, promotion, title, office, jurisdiction, place, or benefice with cure or without cure, or in or to any ecclesiastical living whatsoever, this declaration in manner and form following, the same to be taken by every one whom it concerneth in his own person, and not by a proctor:

Oath or declaration against simony.

“*I, A. B., solemnly declare, that I have not made, by myself or any other person on my behalf, any payment, contract, or promise of any kind whatsoever which to the best of my knowledge or belief is simoniacal, touching or concerning the obtaining the preferment of* . . . ; *nor will I at any time hereafter perform or satisfy, in whole or in part, any such kind of payment, contract, or promise made by any other without my knowledge or consent.*”

Also the person to be instituted shall take the oath of canonical obedience in like manner (*d*).

Oath of canonical obedience.

Which oath is as follows:—

“*I, A. B., do swear,—that I will perform true and canonical obedience to the Bishop of C. and his successors, in all things lawful and honest: So help me God*” (*e*).

By 28 & 29 Vict. c. 122, s. 5, Every person about to be instituted or collated to any benefice . . . shall before institution or collation is made . . . make and subscribe the

Assent to the Thirty-nine Articles and Prayer book.

(*c*) Johns. p. 89.

(*d*) Clarke, *Praxis*, tit. xci.

(*e*) Gibs. p. 810.

Oaths of
allegiance and
supremacy.

declaration of assent (*f*) and the declaration against simony (*g*), and take the said oath of allegiance and supremacy (*h*), in the presence of the archbishop or bishop by whom he is to be instituted, collated . . . or the commissary of such archbishop or bishop.

Subscription
to the three
articles con-
cerning the
supremacy,
the Common
Prayer, and
the Thirty-
nine Articles.

By Canon 36 of 1603, No person was, either by institution or collation, to be admitted to any ecclesiastical living, except he first subscribe to these three articles following:

“That the king’s majesty, under God, is the only supreme governor of this realm and of all other his highness’s dominions and countries, as well in all spiritual or ecclesiastical things or causes, as temporal; and that no foreign prince, person, prelate, state or potentate, hath or ought to have any jurisdiction, power, superiority, pre-eminence or authority, ecclesiastical or spiritual, within his majesty’s said realms, dominions and countries.

“That the Book of Common Prayer, and of ordering of bishops, priests, and deacons, containeth in it nothing contrary to the Word of God, and that it may lawfully so be used; and that he himself will use the form in the said book prescribed, in public prayer, and administration of the sacraments, and none other.

“That he alloweth the Book of Articles of Religion agreed upon by the archbishops and bishops of both provinces and the whole clergy in the convocation holden at London in the year of our Lord God one thousand five hundred and sixty-two: and that he acknowledgeth all and every the articles therein contained, being in number nine and thirty, besides the ratification, to be agreeable to the Word of God.”

This canon, however, has been repealed, and a new one analogous to the statute was passed by Convocation in 1865, and ratified by the Crown in 1866. This canon, containing the Declaration of Assent in the same words as those prescribed by the statute, is as follows:—

New canon.

“No person shall hereafter be received into the ministry, nor either by institution or collation admitted to any ecclesiastical living, nor suffered to preach, to catechise, or to be a lecturer or reader of divinity in either university, or in any cathedral or collegiate church, city or market town, parish church, chapel, or any other place within this realm, except he be licensed either by the archbishop or by the bishop of the diocese (where he is to be placed), under their hands and seals, or by one of the two universities, under their seal likewise; and except he shall first make and subscribe the following declaration, which for the avoiding all ambiguities, he shall subscribe in this order and form of words, setting down both his christian and surname, viz.:—I, A. B., do solemnly make the following declaration:

“*I assent to the Thirty-nine Articles of Religion, and to the*

(*f*) 28 & 29 Vict. c. 122, s. 1.

(*g*) Ibid. s. 2.

(*h*) Contained in 21 & 22 Vict.

c. 48; now, by 31 & 32 Vict. c. 72, altered into the oath of allegiance only as the same is given in this last act.

Book of Common Prayer and of the ordering of bishops, priests and deacons. I believe the doctrine of the Church of England, as therein set forth, to be agreeable to the Word of God; and in public prayer and administration of the Sacraments I will use the form in the said book prescribed, and none other, except so far as shall be ordered by lawful authority.

“And if any bishop shall ordain, admit or license any, as is aforesaid, except he first have declared and subscribed in manner and form as here we have appointed, he shall be suspended from giving of orders and licences to preach for the space of twelve months. But if either of the universities shall offend therein, we leave them to the danger of the law and his majesty’s censure.”

If the bishop admit a clerk as sufficient, he either institutes him in person, or else gives him his fiat, and sends him to his vicar-general, chancellor or commissary, to do it for him (*i*). Concerning the person instituting.

So Archbishop Sancroft, when he had resolved against taking the oaths to King William and Queen Mary, and therefore could not in reason administer them to others, did send his clerks to be instituted to his collative benefices by the vicar-general (*k*).

And not only by commission in particular cases, but also the general power of granting institution, may be delegated by patent to chancellors or commissaries; but this has not always been judged convenient (*l*). At the Convocation of 1640, the contrary was decreed by Canon 11.

During the time that any diocese or inferior jurisdiction is visited, and inhibited by the archbishop, the right of institution belongs to him; and when any see is vacant, the right belongs also to him, or to such other as by composition, prescription, or otherwise, is guardian of the spiritualities (*m*).

If institution be taken from an improper hand, it may be made good by confirmation of the person from whom it ought to have been taken. Thus, we find that an institution, which had been given by the Bishop of St. David’s, pending his suspension, was confirmed by Archbishop Whitgift, as was another institution by Archbishop Abbot, which had been given by the bishop, pending a metropolitan visitation (*n*).

It is not of necessity that the examination, admission or institution, be made by the ordinary within the diocese in which the church is; for the jurisdiction of the ordinary as to such matters is not local, but follows the person of the ordinary wherever he goes (*o*). In what place.

Dr. Gibson, indeed, says that it has not always been understood to be clear law that a bishop may institute out of his

(*i*) Johns. p. 79.

(*k*) Ibid.

(*l*) Gibs. p. 804.

(*m*) Ibid.

(*n*) Gibs. p. 814.

(*o*) Wats. c. 15, p. 154; *Cort v. Bishop of St. David’s*, Cro. Car. p. 341.

diocese, as appears by the many commissions which have been granted from time to time by archbishops to their comprovincial bishops to institute out of their diocese and in any part of the province. Which commission, he says, nevertheless, may be understood in this sense, that though the act shall be good and valid in law when done, yet the doing it without leave is irregular (*p*).

Degge,
Parson's
Counsellor.

The whole matter of admission, institution and induction is well explained in the following passage of Sir Simon Degge's Parson's Counsellor (*q*):—"If the ordinary, &c., upon the examination of the clerk, find him fit in all points as above in the first chapter is directed, then he admits him in these words, *Admitto te habilem, &c.*; and thereupon the ordinary institutes him in these words: *Instituo te rectorem ecclesie parochialis de C. et habere curam animarum, et accipe curam tuam et meam.* And this the bishop may do as well out of his diocese as within it, for as to this matter, it is not local, but follows the person of the bishop whithersoever he goes. When the bishop has instituted the clerk, the ordinary, or &c." [other admitting authority] "makes a mandate under seal to the archdeacon of the place, or to such other clergyman as he pleases, to induct the clerk. And it may be made by the dean and chapter, but not by the patron; for though by the institution the church is full against all persons save the king, yet he is not complete parson till induction; for by the institution he is admitted *ad officium* to pray and preach, yet he is not entitled *ad beneficium* until he be formally inducted, which may be done by the delivery of the ring of the church door or latch of the church gate, or by delivery of a clod or turf and twig of the glebe; but the most common and usual way is, and therefore the safest, by delivery of the bell-rope to the new instituted clerk, and he tolling the bell."

Form and
manner of
institution.

The form and manner of the institution is that the clerk kneels down before the ordinary whilst he reads the words of institution out of a written instrument drawn beforehand for this purpose, with the seal episcopal appendant, which the clerk during the ceremony is to hold in his hand (*r*).

The words of institution are: "*Instituo te ad tale beneficium, habere curam animarum, et accipe curam tuam et meam*" (*s*). The canon law directed the clerk to be invested in the benefice by the delivery of a ring, staff, cup, or pen, or something in the nature of livery of seisin, in token of his possession of the thing to which he was so instituted.

Entry thereof
in the
register.

Institution being given to a clerk, a distinct and particular entry thereof is to be made in the public register of the ordinary: that is, not only that such a clerk received institution on

(*p*) Gibs. p. 804.

(*q*) Part. i. c. 2.

(*r*) Johns. p. 81.

(*s*) 1 Inst. p. 344 a; *Digby's case*,
4 Co. p. 79.

such a day and in such a year, but if the clerk was presented, then at whose presentation, and whether in his own right or in the right of another; and if collated or presented by the crown, then whether *jure pleno* or *per lapsum temporis*. This has been the practice as far back as any ecclesiastical records remain; and it is of great importance that such entries be duly made and carefully preserved, both to the clerk whose letters of institution may be destroyed or lost, and to the patron whose title may suffer in time to come by the want of proper evidence upon whose presentation it was that institution was given. And it might tend perhaps to the better observation hereof, if every clerk, after having passed the examination of the ordinary, and thereupon obtained his fiat, were sent to the proper office of the register for his letters of institution (*t*).

And Lord Coke says, "Present" [Dr. Burn thinks the word "present" was written short in the MS. for "presentations"], "admissions, and institutions, &c., are the life of advowsons: and therefore if patrons suspect that the register of the bishop will be negligent in keeping of them, he may have a *certiorari* to the bishop to certify them into the chancery" (*u*).

A copy of the bishop's institution book is not evidence of a presentation by a patron to a living (*x*). When a blank is left in the register of an institution or collation for the patron's name, parol evidence of common report is admissible to prove who was the patron (*y*). What is evidence of a presentation.

The clerk being instituted, the institution is good, without any after act; yet the ordinary is wont to make letters testimonial thereof (*z*). Letters testimonial thereof.

It is not material what seal the ordinary makes use of in that case (*a*). Seal.

Thus, in the case of *Cort v. The Bishop of St. David's* (9 Car. 1), the Chancellor of St. David's had made use of the Bishop of London's seal, and it was adjudged to be well enough, because it is the act of the court which makes the institution, and the instrument is only a testimonial of that act; and the seal used (whatever it be) shall be taken to be the seal of the person instituting for that time (*b*).

Last of all, the ordinary executes and delivers to the party instituted a written mandate to the archdeacon or other proper person to induct him (*c*). The form of this mandate commonly runs to induct him or his "lawful attorney" or his "proctor" or "proxy." Where this is so, the incumbent may well be inducted by proxy (*d*). Mandate to induct.

(*t*) Gibs. p. 813.

(*u*) 2 Inst. p. 357.

(*x*) *Tillard v. Shebbeare*, 2 Wils. p. 366.

(*y*) *Bp. of Meath v. Lord Belfield*, 1 Wils. p. 215.

(*z*) Wats. c. 15, p. 154.

(*a*) Wats. c. 15, p. 155.

(*b*) Cro. Car. p. 341.

(*c*) Johns. p. 81. As to induction, see further *infra*, p. 359.

(*d*) God. p. 278; Gibs. p. 1513, Forms xix; xx; 2 Ought. Forms clvii, clviii, clxi.

Fee.

By 31 Eliz. c. 6, s. 5, if any person shall for any reward or other profit, or any promise or other assurance thereof, directly or indirectly (other than for usual and lawful fees), admit, institute, instal, induct, invest, or place any person in or to any benefice with cure of souls, dignity, prebend, or other living ecclesiastical, he shall forfeit the double value of one year's profit thereof, and the same shall be void as if such person were naturally dead (*e*).

By a constitution of Archbishop Langton, No prelate shall extort any thing, or suffer any thing to be extorted by his officials or archdeacons for institution or putting into possession, or for any writing concerning the same to be made (*f*).

And by a constitution of Archbishop Stratford, for the writing letters of institution or collation . . . no more shall be taken than 12*d.* (*g*).

Till lately the ecclesiastical fees were regulated by the practice and custom of every diocese, according to a table confirmed by Archbishop Whitgift, and as is directed by the 135th Canon of 1603.

1 & 2 Vict.
c. 106.

Table of fees
to be taken by
officers with
respect to
admissions to
benefices—by
whom to be
established.

By 1 & 2 Vict. c. 106, s. 131, "The Archbishop of Canterbury, the Lord High Chancellor, and the Archbishop of York, with the assistance of the vicars-general of the said two archbishops, . . . shall ordain and establish tables of fees, and shall have power from time to time to amend or alter such tables of fees, in respect of donation, presentation, nomination, collation, institution, installation, induction, or licence, or any instrument, matter, or thing connected with the admission of any spiritual person to any cathedral preferment or any benefice throughout England and Wales, by any officer, secretary, clerk, or minister to whom belong the duties of preparing, sealing, transacting, or doing any of such instruments, matters, and things; and . . . such tables or amended tables shall be submitted to her Majesty's privy council, who may disallow the same or any part thereof; and notice shall be given in the *London Gazette* of such submission to the privy council; and if within the space of three months from the time of giving such notice the same shall not be disallowed, such fees, or such parts thereof as shall not be disallowed, shall . . . be deemed and taken to be lawful fees, and thenceforward such fees, and none others save only such as may be altered or subsequently ordained, as before provided, shall be demanded, taken, or received by any of such officers, secretaries, clerks, or ministers respectively . . . provided always, that the said persons shall not ordain or establish any fees exceeding the fee which for the twenty years next preceding the passing of this act shall have been usually taken for or in respect of the same instrument, matter, or thing, in case of admission to any cathedral preferment or

(*e*) Vide *infra*, Part IV., Chap.
III., sect. 3.

(*f*) Lind. p. 137.

(*g*) Ibid. p. 222.

any benefice within the diocese of London : provided also, that the said persons shall have power to ordain graduated scales of fees in respect of benefices below the yearly value of five hundred pounds."

By an order in council made under this act, and gazetted on the 24th of July, 1857, the fees on institutions to livings and on licences to perpetual curacies are fixed as follows :—

Order in council under this act.

	Vicar-General or Chancellor.	Registrar or other Officer by usage performing the duty.	Secretary of Archbishop or Bishop.	Apparitor.	Sealer.	Record Keeper.
	£ s. d.	£ s. d.	£ s. d.	s. d.	s. d.	s. d.
Donation.....	..	..	2 2 0			
Presentation to a benefice..	..	..	2 2 0			
Nomination to a perpetual curacy ....	..	..	1 1 0			
Collation to a benefice..	1 3 4	2 15 8	4 4 0	3 6	4 6	4 6
Institution to a benefice..	0 16 8	2 2 4	4 4 0	3 6	4 6	2 6
Licence to a perpetual curacy	0 9 4	1 15 8	2 2 0	..	1 0	1 0
Commission for institution ..	..	..	1 1 0			
Do. for licence..	..	..	1 1 0			

	Arch-deacon's Official.	Arch-deacon's Registrar.	Apparitor.	Record Keeper.	Sealer.
	s. d.	s. d.	s. d.	s. d.	s. d.
Induction to a benefice, whether of one or of several united parishes	10 0	13 0	1 0	2 6	1 6

The clerk by institution or collation has the cure of souls committed to him, and is answerable for any neglect in this point (*h*).

Effect of institution or collation.

And as to the temporalities: whereas presentation gives to the clerk a right *ad rem*, so institution or collation gives him a right *in re*: and therefore in virtue of collation as well as of institution, the clerk may enter into the glebe, and take the tithes; though for want of induction he cannot yet grant or sue for them (*i*).

But herein collation and institution differ; that by institution

(*h*) Johns. pp. 81, 84.

(*i*) Gibs. p. 813. See Othobon, Athon, p. 137, where John of Athon

says, "*concessio pralati jus pinguius inducit.*"

the church is full, and plenarty by six months is pleadable against all persons but the king, and against the king also when he claims in the right of a common person: but by collation the church is not full, nor is plenarty by collation pleadable, but the right patron may bring his writ and remove the collatee at any time; unless he be such patron who has also right to collate, for against him plenarty by collation is pleadable. And the reason why collation does not make a plenarty is, because then the bishop would be judge in his own cause, to the great prejudice of patrons; and therefore the bishop's collation in this respect is interpreted no more than a temporary provision for celebration of divine service until the patron do present (*j*).

Why institution does, and collation does not, make a plenarty.

Trial of institution.

Institution is properly cognizable in the ecclesiastical court; but if after induction a man is sued there, supposing his institution was void, that shall be tried in the temporal court, because by the induction the person has a freehold in the benefice, which must be tried at common law (*k*).

Super-institution.

A church being full by institution, if a second institution is granted to the same church, this is a super-institution. Concerning which, two things have been resolved: 1. That the super-institution, as such, is properly triable in the spiritual court. 2. That it is not triable there, in case induction has been given upon the first institution (*l*). Petty, incumbent of a church in Cornwall, travelled into Achaia and other parts of Greece; and it not being known whether he was alive or dead, Glanville was presented, instituted, and inducted, and Petty libelled against him in the ecclesiastical court to try the super-institution; and Noy moved for a prohibition; for since the induction, the ecclesiastical court cannot try the super-institution; and Glanville being then in his first fruits, the prohibition was granted (*m*).

The advantage of a super-institution is, that it enables the party who obtains it to try his title by ejectment, without putting him about to his *quare impedit*: but many inconveniences following from thence (as the uncertainty to whom tithes shall be paid, and the like), this method has been justly discouraged (*n*).

First fruits.

By 26 Hen. 8, c. 3, s. 1, every person "before any actual or real possession or meddling with the profits of his benefice," shall pay or compound for the first fruits and profits of the benefice for one year to the king's use, at reasonable days, upon good sureties.

1 Viet. c. 20, transfers the collection of first fruits and tenths to the treasurer of the Governors of Queen Anne's bounty (*o*).

(*j*) Gibs. p. 813; Wats. c. 12, p. 112; 1 Inst. p. 344 b; *Green's case*, 6 Co. p. 29; vide supra, pp. 342, 346.

(*k*) 2 Roll. Abr. p. 294.

(*l*) Gibs. p. 813.

(*m*) *Pettie's case*, Litt. p. 140. See also *Monday v. Patar*, 2 Lev. p. 125.

(*n*) Gibs. p. 813.

(*o*) Vide infra, Part V., Chap. VIII. sect. 1.

As already stated, after institution given (*p*), the ordinary issues a mandate for induction, directed to the person who has power to induct. And this person, of common right, is the archdeacon. But by prescription or composition, others as well as archdeacons may make inductions; for by prescription the dean and chapter of Lichfield used to make induction, as also did the dean and chapter of St. Paul's (*q*).

Mandate of induction.

So if a church was exempt from archidiaconal jurisdiction (as many churches were), then the mandate was directed to the chancellor or commissary; and if a peculiar, then to the dean or judge within such peculiar. And when an archbishop collates by lapse, or when a see is vacant, the mandate goes, not to the officer of the archbishop, but of the bishop (*r*).

If a bishop dies, or is removed, after institution given and whilst a mandate of induction is either not issued or not executed, the clerk may repair to the archbishop for a mandate of induction. This is, because the authority of the bishop is determined, and that authority devolved to the archbishop as guardian of the spiritualities *sede vacante*. And the same rule takes place if the bishop is visited, and his jurisdiction suspended, after institution and before induction. And though such mandate is not executed before a new bishop is confirmed (who then has authority to grant it), but is executed after, it shall not be void (because it is the act of one who has authority throughout his province), but only voidable at most; as was determined in the Exchequer Chamber (29 Car. 2), in the case of *Robinson v. Wolley* (*s*).

The archdeacon, or other person to whom the mandate is directed, either makes the induction in person, or directs his precept unto others to do it (*t*).

And the induction is to be made according to the tenor and language of the mandate, by vesting the incumbent with full possession of all the profits belonging to the church. Accordingly the inductor usually takes the clerk by the hand, and lays it upon the key, or upon the ring of the church door, or if the key cannot be had, and there is no ring on the door, or if the church be ruined, then on any part of the wall of the church or churchyard, and says to this effect: "By virtue of this mandate, I do induct you into the real, actual, and corporal possession of this church of C. with all the rights, profits, and appurtenances thereto belonging." After which, the inductor opens the door, and puts the person inducted into the church, who usually tolls a bell to make his induction public and known to the parishioners. Which being done, the clergyman who inducts indorses a certificate of his induction on the archdeacon's

Manner of induction.

(*p*) Vide supra, p. 355.

(*q*) Wats. c. 15, p. 155.

(*r*) Gibs. p. 815.

(*s*) Gibs. p. 815; *Robinson v. Wolley*, Jones, p. 78.

(*t*) Gibs. p. 815.

mandate, and they who were present do testify the same under their hands (s).

*Vi laica
removendā.*

If the inductor or person to be inducted be kept out of the church or parsonage-house by laymen, the writ *de vi laica removendā* lay for the clerk, which was directed out of chancery to the sheriff of the county to remove the force, and (if need be) to arrest and imprison the persons who make resistance (t).

Spoliation.

If any other clergyman presented by the same patron with the person to be inducted keeps possession, then a spoliation is grantable out of the spiritual court, whereby the profits shall be sequestered till the right be determined (u).

Donatives.

But donatives are given and fully possessed by the single donation of the patron in writing, without presentation, institution, or induction (x).

Free chapels.

So if the king grants one of his free chapels, the grantee shall be put in possession by the sheriff of the county, and not by the ordinary of the place (y).

Special
usages.

And in some places, a prebendary shall have possession without induction; as at Westminster, where the king makes his collation by his letters patent, and thereupon the party enters upon the prebend without other induction, and it is good. And in some places the bishop makes the induction, and in some places others make it, and the usage generally shall hold place (z).

Sinecures.

But the possession of sinecures must be obtained by the same methods by which the possession of other rectories and vicarages is obtained, namely, by presentation, institution and induction (a).

Fee for
induction.

By a constitution of Archbishop Stratford, it is ordained that for commissions to induct, or certificates of induction, no more shall be taken than 12*d.* (b).

But as to the expenses of the induction itself, it is directed by a constitution of the same archbishop that they who are bound by the mandate of their superior to induct clerks admitted to ecclesiastical benefices shall be content with moderate expenses for such induction to be made, that is to say, if the archdeacon induct, he shall be satisfied with 40*d.*; if his official, he shall be content with 2*s.*; for all and every the expenses of themselves and their servants for their diet; reserving nevertheless to the

(s) Johns. p. 84; Wats. c. 15, p. 167.

(t) Gibbs. p. 783; Johns. p. 84; God. p. 645; F. N. B. pp. 54, 55, 124; Wats. c. 30, p. 307; *Roberts v. Agmondesham*, Moo. p. 462; see also *Bird v. Smith*, *ibid.* p. 481; and *The King v. Zakar*, 3 Bulst. p. 92. In the case of *Ex parte Jenkins*, L. R. 2 P. C. 258, this writ is said to be "an obsolete proceeding;" and it is suggested that the modern remedy would be by in-

junction. There is a constitution of Abp. Boniface (Lind. p. 318) against clerks possessing themselves of benefices by lay power.

(u) Johns. p. 82; 1 Ought. p. 13; F. N. B. p. 36; Wats. c. 30, p. 307; *Termes de la Ley*.

(x) Gibbs. p. 819; *vide supra*, p. 253.

(y) Wats. c. 15, p. 155.

(z) *Ibid.*

(a) Gibbs. p. 818.

(b) Lind. p. 222.

person inducted his option whether he will pay this procuration to the inductor and his attendants in such sum of money or in other necessities (c).

The fees on inductions are now provided for by the order in council stated above (d).

After institution the clerk is not complete incumbent till after induction, or, as the canon law calls it, corporal possession. For by this it is, that he becomes seised of the temporalities of the church so as to have power to grant them or sue for them; by this he is unexceptionably entitled to plead (as occasion shall require), that he is parson imparsonce; and by this also the church is full, not only against a common person (for so it is by institution), but also against the king; and by consequence, it is completely full, and the clerk is complete incumbent or possessor. On which account it is compared, in the books of common law, to livery of seisin; by which possession is given to temporal estates. And what induction works in parochial cures, is effected by installation into dignities, prebends and the like in cathedral and collegiate churches (e). Plowden says, installation is to be done to the prebendary by the dean and chapter, and induction to the parson or vicar by the archdeacon (f).

Effect of
induction.

Induction is an act of a temporal nature. So the books of common law everywhere declare (notwithstanding it is an act of spiritual persons about a spiritual matter; because it instates the incumbent in full possession of the temporalities, as these are opposed to the spiritual office or function. Upon which account it is cognizable only in the temporal courts (g).

Induction of
temporal
cognizance.

And upon the like ground it is held, that the archdeacon, if he refuse or delay to induct, is not only punishable by spiritual censures, but is also liable to an action on the case in the temporal court (h).

In the archbishop's registry, mention is made of appeals to the archbishop, where the person who had been instituted was denied induction, or the mandate of induction; and liberty given, in other instances, to persons who pretended an interest, to show cause why induction ought not to be granted after institution given (i).

By his induction the parson is put in possession of a part for the whole, and may maintain an action of trespass on the glebe land, although he has not taken actual possession of it (k).

(c) Lind. p. 140; where a long commentary on this constitution is given; see also Gibs. p. 814.

(d) Vide supra, p. 357.

(e) Gibs. p. 814; *Hare v. Buckley*, Plow. p. 528; Dyer. p. 221 b; *Vaughan v. Ascue*, 2 Roll. p. 451.

(f) Ibid.

(g) Gibs. p. 815; *Hutton's case*, p. 15; *Monday v. Patan*, 2 Lev. p. 125.

(h) *Robinson v. Woolley*, 1 Ventris, p. 309.

(i) Gibs. p. 815.

(k) *Bulwer v. Bulwer*, 2 B. & A. p. 470.

An archdeacon of Rochester, when instituted and inducted into that office, is *ipso facto* inducted into the prebend annexed to it by royal grant, and may claim to be sworn in as prebendary without being installed (*l*).

Medieties.

The bishop has been empowered by statute to apportion the spiritual duties of a benefice to which more than one person is instituted (*m*).

2 & 3 Vict.
c. 30.

In benefices where there are more than one spiritual person instituted to the cure of souls, the bishop may order an apportionment of spiritual duties, if no cause is shown to the contrary.

By 2 & 3 Vict. c. 30, after reciting that "There are several benefices, in every of which more than one spiritual person is instituted or otherwise admitted to the cure of souls generally within the same," it is enacted, that "It shall be lawful for the bishop of the diocese in which any such benefice having more than one spiritual person instituted or otherwise admitted or licensed to the cure of souls generally within the same is locally situated, from time to time to direct a decree, with intimation, to issue from the registry of the diocese, calling upon the spiritual persons instituted or otherwise admitted to the cure of souls, and upon the churchwardens or chapelwardens and other inhabitants of any such benefice, or any of them, to show cause before the bishop in person, at a time and place specified in such decree, such time not being within one month from the service of such decree, and such place being within the diocese, why the spiritual duties of such benefice should not be apportioned between or among such spiritual persons in the manner and in the proportions specified in such decree; and if at the time and place appointed cause to the contrary be not shown to the satisfaction of the said bishop, it shall be lawful for him to issue an order in pursuance of, and in conformity with such decree, or, if cause be shown, to withhold, amend, or vary such order, as to him may seem just and proper; and every such order shall issue under the hand and episcopal seal of the bishop, and shall, on its being issued, be registered in the registry of the diocese; and every such decree and order shall be served on every such spiritual person thereby affected, and on one of the churchwardens or chapelwardens of the benefice, by delivering to them a copy thereof, or leaving a copy at the house or legal residence of such spiritual person, churchwardens or chapelwardens, and on the inhabitants of the benefice, by affixing and leaving affixed a copy thereof on the doors of the several churches or chapels of such benefice; and a copy of such order shall be deposited and preserved by the churchwardens of the parish or parishes within such benefice, or one of them, in the parish chest of every such parish, and be shown without fee to any parishioner requiring to see the same, at reasonable times; and in case any such spiritual person shall refuse or neglect to comply with such order for the space of one month after such

Proceedings in case of neglect to comply with the order.

(*l*) *Rex v. Dean and Chapter of Rochester*, 3 B. & Ad. p. 95; *S. P. Rex v. Baylay*, 1 B. & Ad. p. 761.

(*m*) *Vide supra*, p. 268; *infra*, Chap. XIV., sect. 2.

service, or if any such spiritual person shall at any time after such service refuse or neglect to perform the spiritual duties of the benefice in the manner and proportions in and by such order directed, then and in any or either of such cases, it shall be lawful for the said bishop to proceed against such spiritual person so neglecting or refusing to comply with such order in the same manner as the bishop is empowered to proceed in the case of a spiritual person by reason of whose negligence the ecclesiastical duties of his benefice are inadequately performed: Provided always, that any such spiritual person, or churchwarden, chapelwarden or inhabitant, who shall have appeared to show cause against, and who shall think himself aggrieved by any order made by any bishop in pursuance of the powers given to the bishop by this act may, within thirty days from the service of such order, appeal against the same to the archbishop of the province, and the archbishop shall hear and determine such appeal, and confirm, revoke, or vary such order, as to him may seem just and proper; and if he shall revoke or vary the same, such revocation or variation shall be registered in the registry of the diocese, and be served, preserved, shown and enforced as hereinbefore directed with regard to the original order; and it shall be lawful for the archbishop, if he shall think fit, to order the appellant to pay the costs of such appeal: Provided also, that in any case in which an appeal shall be interposed by any spiritual person, notice thereof shall forthwith be given, by or on behalf of the bishop by whom the order appealed from shall have been made, to the churchwardens of the parish, and to the spiritual persons having the cure of souls in such parish; and all persons interested in such order shall be entitled to be heard before the archbishop to oppose the revocation or variation sought to be obtained by the original appellant from such order."

Appeal.

Notice of appeal.

Hearing of appeal.

Since this act was passed, however, provision has been made towards abolishing this class of benefices (*n*).

The old law on the subject of the requisites after induction was contained in 13 Eliz. c. 12, ss. 1, 3; 14 Car. 2, c. 4, ss. 2, 3; and 23 Geo. 2, c. 28. On these statutes there were several cases decided, most of which have under the present law become immaterial.

Requisites after induction.

Now by the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), s. 7, "Every person instituted or collated to any benefice with cure of souls, or licensed to a perpetual curacy, shall, on the first Lord's Day on which he officiates in the church of such benefice or perpetual curacy, or on such other Lord's Day as the ordinary may appoint and allow, publicly and openly, in the presence of the congregation there assembled, read the Thirty-nine Articles of Religion, and immediately after reading the same make the said declaration of assent, adding, after the

28 & 29 Vict. c. 122.

(*n*) See 3 & 4 Vict. c. 113, s. 72; 32 & 33 Vict. c. 94, s. 9, vide *infra*, Chap. XIV., sect. 2.

words 'articles of religion,' in the said declaration, the words 'which I have now read before you.'

"If any person instituted, collated or licensed as aforesaid wilfully fails to comply with the provisions of this section, he shall absolutely forfeit his benefice or perpetual curacy, but no title to present by lapse shall accrue by any such forfeiture until the ordinary has given six months' notice thereof to the patron" (o).

Evidence of compliance.

The old books say that if a parson or vicar claims tithes in right of the church or benefice whereof he is incumbent, he is in strictness bound to prove his institution, induction, and all things else required by law to qualify him to be incumbent of that church to which the tithes belong. But if he has been for several years in possession, he is not ordinarily put to prove these matters, unless the defendant in his defence shows some reasons why these things ought to be proved and made out. But the law does not determine how many years the plaintiff ought to be in the possession of his benefice, to excuse him from being put to the proof of these things; but that seems to be left to the discretion of the judge who tries the cause: though it seems that a small number of years', as three or four, quiet possession may be sufficient (p).

Woodcock v. Smith.

And in *Woodcock v. Smith* (1718), it was declared by the whole Court of Exchequer, that although at law they held a parson or vicar to the proof of his admission, institution and induction, and reading the articles; yet they never did it in equity (q).

Powel v. Milbank.

The case of *Powel v. Milbank* (13 Geo. 3) has been already referred to (r). In that case the Court made these observations on this subject: "As to the second question, we are all of opinion, that in the present case, as no evidence was given by the defendant to raise a doubt whether the plaintiff had subscribed, &c., it was not incumbent on him to give evidence of his having actually done so. The presumption always is, that every man conforms to the law, and that presumption shall stand till something appears to shake it. Nor is the defendant hereby put upon proving a direct negative. It is a negative qualified with circumstances. Some of these ceremonies are to be performed publicly within a limited time; registers are kept of the others. And if evidence had been given that a person had regularly attended the church, and heard nothing of this matter; or if a search had been made in the bishop's register, and nothing had been found therein, this would have destroyed the presumption, and put the plaintiff on proof of his having performed those requisites. . . . In *Dr. Sherard's case*, before Mr. Justice

(o) For the old law as to lapse in these circumstances, see *Bacon v. Bp. of Carlisle*, Dyer, p. 346; 6 Co. p. 29. See also *Gibs*, p. 817; 4 Inst. p. 323; et vide infra, sect. 9.

(p) *Bohun Law of Tithes*, p. 433; *Doe d. Kerby v. Carter*, Ry. & M. p. 237.

(q) *Bunb.* p. 25.

(r) Vide supra, p. 255.

Wilmot, at Sarum Assizes, about ten years ago, where a prebendary brought an ejectment for a house belonging to his prebend, and was required to show that he had performed the requisites necessary by law to make him prebendary; it was holden that it ought to be presumed he had performed them, till something appears to the contrary" (s).

In order that the clerk may be prepared to make proof of these matters when called upon, it may be convenient that he have some intelligent persons, whom he may trust, present when he is inducted; and (if it may be) the same persons present at such time when he shall perform the other matters required by the law to be performed in his parish church; and to the end that they may be able to testify that all things are done as they ought to be, the clergyman may desire them to read with him, or to observe as he reads the morning and evening prayer, and also the Thirty-nine Articles; and he ought also to give them a copy of the declaration which he is to read; for otherwise, if their testimony be wanted, it will be hard for them to depose that he read a true copy thereof, and that all things were done according to law. And it is also advisable that he make a writing to be subscribed by his witnesses, after this or the like form:—

We whose names are underwritten do hereby certify and declare that A. B., rector of C., within the diocese of D., in the county of E., was in the presence of us inducted into his church of C. aforesaid, by F. G., rector of H., on the —— day of ——, in this present year, by virtue of certain letters of induction made under the hand and seal of I. K., archdeacon of L., within the diocese aforesaid, for that purpose directed "To all and every," &c. And also that the aforesaid A. B. on the —— day of ——, in the year aforesaid, being the first Lord's day on which he officiated in his church aforesaid [or being a Lord's day appointed and allowed by the ordinary for that purpose] did in his church aforesaid, publicly and openly, in the presence of the congregation there assembled, read the Thirty-nine Articles of Religion, and immediately after reading the same make the declaration following: "I, A. B., do solemnly make the following declaration: I assent to the Thirty-nine Articles of Religion and the Book of Common Prayer, and of the ordering of bishops, priests, and deacons. I believe the doctrine of the Church of England as therein set forth to be agreeable to the word of God; and in public prayer and administration of the Sacraments I will use the form in the said book prescribed and none other, except so far as shall be ordered by lawful authority." And these things we promise to testify upon our oaths, if at any time we shall be lawfully thereunto required. In witness whereof we have hereunto set our hands, this —— day of ——, in the year of our Lord —— (t).

It only remains to mention that a perpetual curate is put in possession of his benefice by licence from the bishop without

Practical directions.

Form of certificate of compliance.

Perpetual curates.

(s) 2 Black. W. p. 851.

(t) See Wats. p. 167.

either institution or induction; and that, where there is a patron of the curacy, he nominates his clerk to the bishop for the licence (*t*).

—♦—

SECT. 9.—*Lapse*.

What lapse is. Lapse, *lapsus*, is a slip or departure from a right of presenting to a void benefice, when the proper patron has neglected to present within six months next after the avoidance, and that benefice is commonly said to have lapsed; to which he that ought to present has lost his opportunity of doing so.

And in such case the patronage devolves from the patron to the bishop, from the bishop to the metropolitan, and from the metropolitan to the king; that is, to the bishop, as ordinary; to the metropolitan, as superior; and to the king, as patron paramount (*u*).

For it is to be remembered, that churches and dioceses were of common right under the care of the bishops; and it was by particular indulgence that the patrons had the right of presentation; which being neglected, things return to common right; and therefore the bishop has a true interest, and acts not in the right of the patron, but his own. And if the bishop does not collate within six months, then it falls to the archbishop; not as ordinary, but as superior; to whom the right of devolution falls upon the inferior's neglect. Upon the metropolitan's neglect, then it falls to the king (as the lawyers express it) as patron paramount of all the benefices within the realm, by which is meant, that the king, by right of his crown, is to see that all places be duly supplied with persons fit for them; and if all others whom the law has intrusted do neglect their duties, then by the natural order and course of government it falls to the supreme power, which is to supply defects and to reform abuses (*x*).

Incurring in
six months.

The term or space in which title by lapse accrues successively to the forementioned superiors, is six months. The canon law upon this head did make a distinction between lay patrons, and clergymen being patrons; appointing four months in case of the former, and six months in case of the latter. But the common law observes not this distinction; but gives ecclesiastical and temporal patrons an equal title to present at any time within the six months (*y*).

Six months,
how com-
puted.

And because this computation concerns the church, therefore it shall be made according to the computation of the church, that is, by the calendar, for one half-year, and not accounting

(*t*) Vide supra, p. 214.

(*u*) Gibs. p. 768.

(*x*) 1 Stillingfleet, Eccl. Cas.

p. 320. [A Discourse concerning bonds of resignation, pp. 47—50.]

(*y*) Gibs. p. 768.

twenty-eight days to the month; and the day on which the church becomes void is not to be taken into the account (z).

As to the time from which the six months are to commence, the rule of the canon law in all cases was, that the six months shall be reckoned not from the time of the avoidance, but from the time of notice; and so it is held in some of the old books (a). *Semestre tempus non a tempore vacationis, sed notitie ipsius potius volumus computari* (b).

From what time the six months to be computed.

Thus Rolle says, that the six months shall begin from the time of the patron's knowledge of the avoidance; and so it was adjudged upon a writ in the time of king Edward II. As if the incumbent die beyond sea, the six months shall not be computed from the time of his death, but from the time of the patron's knowledge thereof: and so it was adjudged in a case between the Abbot of St. Mary's, York, and the Bishop of Norwich, in a *quare non admisit*. For the six months shall not be reckoned from the death of the last incumbent, but from the time the patron might (according to a reasonable computation, having regard to the distance of the place where he was at the time of the incumbent's death, if he were within the realm at that time) have come to the knowledge thereof: for he ought afterwards to take notice thereof at his peril, and not before, for that he was in some other county than that where the church is, and wherein the incumbent died (c).

And Dr. Watson says, the law (he finds) has been holden to be, that the six months for lapse upon an avoidance shall not be accounted but from the time the patron could reasonably be supposed to have notice of the incumbent's death; especially if the patron or incumbent should happen to be beyond the seas, or in some remote county within the realm, at the time of such avoidance: but by the common law of England (he says) the six months, as he supposes, shall be accounted from the time of the death (d).

And Dr. Gibson says, forasmuch as the former notion was attended with great uncertainty, therefore the common law has made this distinction; that where the avoidance is occasioned by an act between the ordinary and the incumbent (as in the case of deprivation, and resignation (e)) lapse shall incur from the notice given by the bishop, or (if he die) by his successor: but where it is occasioned by the act of God (as in the case of death), or by the act of the incumbent (as in the case of cession), no notice need be given, but the patron is bound to take notice of it; and so, lapse shall incur from the time of death or cession (f).

(z) 2 Inst. p. 360; *Catesby's case*, 6 Co. p. 61 b. Dyer, p. 327 b; *Catesby's case*, 6 Co. p. 62.

(a) Gibs. 769.

(b) X. iii. 8, 5.

(c) 2 Roll. Abr. pp. 363, 364.

(d) Wats. c. 1, p. 4; Leon, p. 46;

Abp. of York and Willock's case,

(e) As to lapse after resignation, vide infra, Chap. XIII.

(f) Gibs. p. 769; 1 Stillingfleet, Eccl. Cas. p. 360.

In general, where a person is deprived, notice of the sentence must be given to the patron before a lapse shall accrue to the bishop (*g*).

In ancient times, when means of communication were uncertain, there were various constitutions against filling up a benefice prematurely on supposition of the death of the incumbent and holding the benefice against the old incumbent on his return (*h*).

Where an
insufficient
clerk is
presented.

The law as to the ordinary giving notice to the patron where a clerk is refused for want of abilities or morals, or being an illiterate clerk, has been stated in the earlier part of this chapter (*i*).

Where usur-
pation.

It has also been held, that although no lapse shall incur, if no notice be given; yet, if in such case a stranger present, and his clerk is instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn; because induction is a notorious act, of which he is bound to take notice (*k*).

Where lapse
happens
through
bishop's own
default.

But if the clerk, whether of an ecclesiastical or lay patron, be not refused, but only the bishop delays the examination of him, whereby the six months pass; lapse shall not incur, because the church remains void by the bishop's own default, and he is thereby a disturber (*l*).

And generally, lapse shall incur or not incur, according as it happens or not through the default of the bishop, and according as he is named or not named in the writ of *quare impedit* brought upon that occasion. So, if the bishop will not award a *jus patronatus* when required, or refuses the clerk without cause, and the church becomes litigious; in such cases the lapse shall not incur. But if he do what is his duty upon a presentation made to him, and refuses with good cause, and is not named in the *quare impedit*; or if no presentation is made, and yet a *quare impedit* is brought against patron and ordinary; the lapse shall incur, and his collation thereupon shall be good (*m*).

Also, after the commissioners, upon a *jus patronatus* awarded, have certified the right as it is found before them, the bishop shall not take advantage of the lapse; that is, if the clerk of the patron for whom it is certified, afterwards makes a new request to the ordinary to be admitted, which may be done upon the first presentation; but without such after request, the ordinary may have the void turn, as by lapse, such inquiry and certificate notwithstanding (*n*).

(*g*) See Wats. c. 6, p. 55; *Bedinfield v. Abp. of Canterbury*, Dyer, p. 292 b.

(*h*) *Othobon, Athon.*, p. 29; *Othobon, Athon.*, p. 97; *Lind.* p. 143.

(*i*) Vide supra, p. 326.

(*k*) *Gibs.* p. 769; *Servein v. Bp.*

of Lincoln, Noy. p. 65.

(*l*) Wats. c. 12, p. 113; 2 Roll. Abr. p. 366.

(*m*) *Gibs.* p. 769; *Whitlock v. Horton*, Cro. Jac. p. 93; *Brickhead v. Abp. of York*, Hob. p. 200.

(*n*) Wats. c. 12, p. 114; vide supra, p. 337.

Also, if when a church is litigious, no *jus patronatus* is awarded, but only an action of *quare impedit* is brought by one party, who recovers against the other; if the bishop was not named in the writ, and the six months pass pending the same, lapse shall incur, for that there was no default in the bishop. And though the patron in such case recovers within the six months; yet if the six months pass before the writ to the bishop be taken forth, lapse shall incur; and if the ordinary collates before the receipt of the writ, his clerk shall not be removed. And so it is, if after the recovery within the six months the defendant brings a writ of error, and the six months pass pending the same; unless the plaintiff, before the six months by such means pass, brings a *quare impedit* against the bishop, for thereby it has been said that lapse shall be prevented. However it is generally said, that if a *quare impedit* in any case be brought, and the bishop be named therein, lapse shall not pass to the ordinary pending the writ (*o*). But he ought to see that the cure be served by allowance out of the profits, to be taken by sequestration (*p*).

Title by lapse can never accrue to the metropolitan, or to the king, unless it has first accrued to the immediate ordinary. This is agreed on all hands, even though the lapse be lost by default of the ordinary, as for want of giving notice, or the like; and for the same reason, if a clerk is instituted, and remains eighteen months without induction; though institution is no plenarty against the king, yet being so against the bishop, no title by lapse shall accrue to the king (*q*).

And by 25 Edw. 3, st. 6, c. 7, "Because that many presentments to divers benefices of holy church, as well of the patronage of lay people, as of people of holy church, which were void by six months, whereof the collation of such benefice by lapse of time was devolute and of right pertaining to the ordinaries of the places, were recovered by the king by judgements thereof given of the assent of the said patrons, in deceit of the said collations so made reasonably by the said ordinaries; in which pleas the ordinaries, nor their clerks, to whom they did give such benefices, were not received to show nor defend their right in this behalf, nor to counterplead the king's right so claimed which is not reasonable: wherefore the king by the assent of the said parliament, will and granteth for him and his heirs, that when archbishops, bishops, or other ordinaries, have given a benefice of right devolute to him by lapse of time, and after the king presenteth and taketh the suit against the patron, which percase will suffer that the king shall recover without action tried, in deceit of the ordinaries, or the possessors of the said

Lapse shall not incur *per saltum*.

25 Edw. 3, st. 6, c. 7.

(*o*) Wats. c. 12, p. 114; *Birkhead v. Abp. of York*, Hob. p. 201; vide supra, p. 347.

(*p*) *Lancaster v. Lowe*, Cro. Jac. p. 93.

(*q*) Gibs. p. 769; Wats. c. 12, p. 114; 1 Inst. p. 344 b; 2 Roll. Abr. p. 368; *Lancaster v. Lowe*, Cro. Jac. p. 93; *Grendon v. Bp. of Lincoln*, Plow. p. 493.

benefices; that in such case, and all other cases like, where the king's right is not tried, the archbishop or bishop, ordinary or possessor, shall be received to counterplead the title taken for the king, and to have his answer, and to show and defend his right upon the matter, although that he claim nothing in the patronage in the case aforesaid."

Bishop being both patron and ordinary shall not have twice six months.

Although the bishop be both patron and ordinary, he shall not have a double time to present in, but only six months, before title by lapse accrues to the metropolitan. And there is a parity of reason, for its passing from the metropolitan to the king in six months, where the metropolitan is both patron and ordinary (as it frequently happens in churches within his own diocese); for the title by lapse is in the nature of a trust, and not of an interest; and the self-same person who has neglected that trust, and kept the church destitute of a pastor for one six months, ought not in equity to have it in his power to keep it vacant for six months more (*r*).

Lapse incurred during the metropolitanical visitation.

If an archbishop visits an inferior diocese, and inhibits the bishop during the visitation (as the use is), and afterwards during the visitation and inhibition, and before any release made by the archbishop, some church in the same diocese lapses, although the jurisdiction of the ordinary be suspended during the visitation, so that he cannot in any such case collate his clerk himself, yet he shall have the benefit of the lapse, and not the archbishop; to whom in this case the bishop must as a common person present his clerk, and the archbishop as his ordinary ought to institute upon such presentation (*s*).

And the reason is plain; for although the bishop is under inhibition during the time of the visitation, yet such inhibition reaches not his right of patronage, but only suspends his right of institution and collation; and therefore the only difference is, that instead of collating by his own authority, he is to present his clerk to the archbishop for institution (*t*).

Bishop dying after lapse incurred.

If title by lapse has accrued to the bishop, and he dies, or is translated, or deprived, before he takes the benefit of it, the devolution is to the metropolitan, as he is guardian of the spiritualities, and as this is not an interest, but a mere spiritual trust. For although it is laid down in an ancient writ, as a thing notorious, that churches which belonged to the collation of bishops while they lived, do belong to the king by reason of his custody thereof in the time of the vacation; yet this relates only to such avoidances as belong to the bishops in their own right; but lapses belong to the guardians of the spiritualities, whoever they be (*u*).

(*r*) *Gibs.* p. 769; *Wats.* c. 12, pp. 115, 116.

(*s*) *Wats.* c. 12, p. 115; 2 *Roll. Abr.* p. 367.

(*t*) *Gibs.* p. 770.

(*u*) *Wats.* c. 12, p. 115; *Gibs.* p. 770; *Robbin's case*, *Noy*, p. 69; but see 2 *Roll. Abr.* pp. 345, 367; *Colt v. Bp. of Coventry*, *Hob.* p. 154; *Rennell v. Bp. of Lincoln*, 9 *B. & C.* p. 163.

By the statute of *Prerogativa Regis*, "Of churches being vacant, the advowsons whereof belong to the king, and other present to the same, whereupon debate ariseth between the king and other: if the king by award of the court do recover his presentation, though it be after the lapse of six months from the time of the avoidance, no time shall prejudice him, so that he present within the space of six months." No lapse from the king.

The meaning of which statute is, that where a church belonging to the patronage of the king is litigious, and not recovered in six months, lapse shall not incur, as in the case of a common person; but the last clause seems to be a limitation of that privilege: viz., on condition that the king present within the space of six months after it is recovered; and if he present not, then lapse to incur. But it being a maxim in law, that *nullum tempus occurrit regi*, and the restraining words being not express, that the prerogative shall be restrained in that particular; but only words of implication; the law is taken to be that the church can in nowise go in lapse from the king (*x*).

And therefore there is no remedy against a neglect in the king to fill vacant churches, but only the ordinary's sequestering the profits of the church, and appointing a clerk to serve the cure (*y*).

After a church is lapsed to the immediate ordinary, if the patron presents before the ordinary has filled the church, the ordinary ought to receive his clerk. For lapse to the ordinary is only an opportunity of executing a trust, viz., of seeing the cure supplied in case of the patron's neglect; which being performed by the patron himself, the ordinary can take no advantage by it (*z*).

Patron's right where advantage of the lapse is not taken.

And the like law is, if lapse be accrued to the metropolitan: for then, if the patron present to the inferior ordinary, whilst the church remains void, he is bound to receive his clerk, and the metropolitan is barred (*a*).

But if the ordinary of the diocese or metropolitan has collated his clerk, whilst the turn was respectively theirs, although the clerk be not inducted; the patron's clerk, if after that presented, is not to be admitted (*b*).

Or if the inferior ordinary, after the time is gone by lapse to the metropolitan, has collated his clerk to the benefice that is in lapse, although this collation be tortious to the metropolitan, yet it seems that it takes away the presentation of the patron, so that he shall not present, and is only an usurpation upon the metropolitan (*c*); and thereby the metropolitan is put out of possession, and driven to his *quare impedit* (*d*).

(*x*) *Gibs.* pp. 766, 770.

Dialogue 2, c. 36.

(*y*) *Ibid.* p. 770; 18 *Edw.* 3, 21; 14 *Hen.* 7, p. 21; *Dr. & St. Dialogue* 2, c. 36.

(*b*) *Wats.* c. 12, p. 117; *Dyer*, p. 277.

(*z*) *Wats.* c. 12, p. 117.

(*c*) 2 *Roll. Abr.* pp. 350, 368.

(*a*) *Ibid.*; *Keilwey*, p. 50; 1 *Anders.* p. 148; *Booton v. Bp. of Rochester*, *Hutton*, p. 24; *Dr. & St.*

(*d*) *Wats.* c. 12, p. 117; *Green's case*, 6 *Co.* p. 30 b; *Boswell's case*, *ibid.* p. 50.

As against
the crown.

It has been a question, whether the bishop ought to admit the patron's clerk after the title of lapse is passed from the metropolitan to the king (*e*). On which Dr. Watson says, that by Hobart, the patron's presentation takes place after the church is lapsed to the king, if it be exhibited to the ordinary before the king's; because the patron's right to present continues until the title by lapse be executed, and the king's title is not vested in him in this case absolutely, as other titles are, but conditionally, viz., if he presents before the patron; because the king has it only as supreme ordinary. But by others, the turn is by lapse so vested in the king, that if the patron's or other person's clerk be admitted to a church, after it is come to the king by lapse, the king by *quare impedit* may recover the presentation, and remove such clerk. And this latter opinion is taken to be the law. So if the king has title by lapse to present to a prebend of his free chapel, for that the dean thereof has not collated to it within six months, though the dean collates before the king presents, yet the king shall remove his clerk (*f*).

Hobart had said that the patron's title continued against the king as well as the ordinary, till the lapse be executed (*g*).

And this power in the king is in effect the same that the pope claimed and exercised, as appears by the direction given to his legates in this very case, which became part of the body of the canon law; where, speaking of such benefices or dignities as were lapsed to him, and filled by the patrons notwithstanding such lapse, he orders them to permit the persons so presented, if they be persons fit and sufficient, peaceably to enjoy the same; otherwise that they remove them, and put others sufficient in their places (*h*).

But if in such case the patron's clerk is suffered to die incumbent, or is deprived, the king's turn is served, and he has lost the advantage of the lapse. Upon which head all the books are clear, as to death; and most of them, as to deprivation; but many of them will not allow the same reason, in case of resignation, because there is room to suspect fraud and covin (*i*).

A donative remaining void never goes in lapse, unless it be specially provided for by the foundation, or by composition afterwards; but the ordinary may compel the patron to fill the same by ecclesiastical censures (*k*).

But if it is augmented by the governors of Queen Anne's bounty, it will lapse in like manner as presentative livings (*l*).

(*e*) Dyer, p. 277.

(*f*) Wats. c. 12, p. 118.

(*g*) *Colt v. Bp. of Coventry*, Hob. p. 154; *acc. Booton v. Bp. of Rochester*, Hutton, p. 24; *contra*, 2 Roll. Abr. p. 368; *Cumber v. Episcopus Chichester*, Cro. Jac. p. 216.

(*h*) Gibs. p. 770; X. i., 10, 4.

(*i*) Ibid.; *Baskerville's case*, 7 Co.

p. 28; *Beverley v. Cornwall*, Cro. Eliz. p. 44; 1 Anders. p. 148; *Rea v. The Bp. of Winton*, Cro. Jac. p. 53; and *Cumber v. Episcopus Chichester*, ibid. p. 216; *Pinson's case*, Hetley p. 125.

(*k*) Wats. c. 12, p. 109; *Fairchild v. Gaire*, Yelv. p. 61; see p. 256, *supra*.

(*l*) 1 Geo. 1, st. 2, c. 10, s. 6.

No lapse of
a donative.

CHAPTER XII.

INCIDENTS OF BENEFICES.

- SECT. 1.—*Vacation.*
 2.—*Exchange.*
 3.—*Plurality and Commendam.*
 4.—*Sinecure.*

SECT. 1.—*Vacation (a).*

MR. SERJEANT STEPHEN observes (*b*) (reciting in part the language of Blackstone), "It is only in an estate *per autre vie* . . . that our law affords an example of the title by occupancy. It is difficult at least to put any other instance wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no actual owner of the land till a successor is appointed, yet there is a legal potential ownership subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced."

Who shall have the profits during vacancy of a benefice.

By the common law of the church, the profits of the vacation were to be laid out for the benefit of the church, or reserved for the successor; but by special privilege or custom, the bishop or archdeacon might have the same, or some part thereof; so also, it is said, the king might take the profits of a free chapel, and the patron of a donative the profits of such donative, during the time of vacation (*c*).

But by 28 Hen. 8, c. 11 (*d*), it is enacted in substance as follows: Forasmuch as in the statute for the payment of first fruits (26 Hen. 8, c. 3), it is not declared who shall have the fruits, tithes, and other profits of spiritual promotions, offices,

28 Hen. 8, c. 11.

(*a*) The history of the ancient ecclesiastical law upon this subject will be found in Thomass. pt. iii., l. 2, c. 51, vol. viii. pp. 326—360, "De spolio et de statu rerum ecclesiæ sede vacante."

(*b*) Stephen's Comm. ed. 1880, vol. i. pp. 418, 448.

(*c*) Lind. p. 137; Gibs. p. 748.

(*d*) See, on the construction of this statute, *Halton v. Cove*, 1 B. & Ad. p. 538.

benefices and dignities, during the time of vacation thereof, divers of the archbishops and bishops of this realm have not only, when the time of the taking of tithes hath approached deferred the collation of such benefices as have been of their own patronage, but also have upon presentations of clerks made unto them by the just patrons deferred to institute, induct, and admit the same clerks, to the intent that they might receive to their own use the same tithes growing and arising during the vacation, so that through such delays (over and above the first fruits) they have been constrained to lose all or the most part of one year's profits, to their great loss and hindrance: it is therefore enacted, by sect. 1, that the tithes, fruits, oblations, obventions, emoluments, commodities, advantages, rents, and all other whatsoever revenues, casualties, and profits, certain and uncertain, belonging to any archdeaconry, deanery, prebend, parsonage, vicarage, hospital, wardenship, provostship, or other spiritual promotion, benefice, dignity or office, growing or coming during the time of vacation, shall belong to such person as shall be thereunto next presented, promoted, instituted, inducted, or admitted, towards the payment of his first fruits (*d*).

By sect. 2, If any archbishop, bishop, archdeacon, ordinary, or any other person or persons to their uses and behoof, shall receive or take the same, and shall not upon reasonable request render the same to the next incumbent lawfully instituted, inducted or admitted, or shall let or interrupt the said incumbent to have the same, he shall forfeit treble value, half to the king and half to the incumbent, to be recovered in any of the king's courts.

To such Person as shall be thereunto next presented, promoted, instituted, inducted, or admitted.]—In order to receive the benefit of this clause, it is not absolutely necessary that the clerk be presented by the lawful patron; but if he get institution and induction, though he is afterwards removed by *quare impedit*, he, and not the clerk who comes in upon such removal, shall have the profits of the vacation. And the reason is, because till he is removed he is incumbent *de facto*, and as such is liable to all burdens and duties, and is therefore, in reason and equity, entitled to all the profits (*e*).

But in cases where the institution and induction are declared by law to be *ipso facto* void (as in case of simony, or the like), there the church having been really never full since the death of the foregoing incumbent, and by consequence the vacancy still continuing, the profits of course shall pass to him who shall be next presented, instituted, and inducted (*f*).

But though the church becomes void by the omission of some subsequent duty to be performed, yet having been full by

(*d*) Vide *infra*, Part V., Chap. p. 62; Gibs. p. 749; 17 Vin. Abr. VIII., sect. 1. p. 495.

(*e*) *Whistler v. Singleton*, 1 Roll. (*f*) Gibs. p. 749.

institution and induction, and the person thereby liable to the payment of first fruits, he shall not lose the profits of the vacation; only the profits from the time of such avoidance *ipso facto* will go to the next incumbent, as profits of the vacation, which commences from thence (g).

[*Inducted or admitted.*]—This cannot be understood disjunctively, as if presentation or admission (without institution and induction) entitled the successor to the profits of the vacation; but admission here (coming after induction) was plainly added, to include those preferments which are not taken by institution and induction. And although in preferments which are so taken, institution gives a right to enter upon and take the profits as well of the vacation as others; yet that which alone can give a right to sue for them, is induction (h).

Anciently upon the death of an incumbent, without any formal sequestration, the rural dean was to take the vacant benefice into his safe custody, and to provide for the necessary cure of souls; and to take care that the glebe land was seasonably tilled and sowed, to the best advantage of the successor, to whom he was to give up the intermediate profits, and be allowed his necessary charges, which upon dispute were to be moderated by the bishop or his official. But the canon lawyers in process of time deprived the country deans of this, as well as of all other parts of jurisdiction; and the chancellors of bishops, or their archdeacons, laid claim to the custody of vacant churches, and by forms of sequestration assigned them over to the *æconomi*, or lay guardians of the church (i).

Sequestration issued, on a benefice becoming void.

For now, the ordinary way of managing the profits of vacation is by sequestration granted to the churchwardens (k).

The churchwardens, having taken out a sequestration under the seal of the bishop, are to manage all the profits and expenses of the benefice for the successor: to plough and sow the glebe, thresh out and sell corn, collect tithe rent-charge, repair houses, make up his fences, pay his tenths, and what other things are necessary during the vacation (l).

Management of the profits.

The sequestrators could not formerly maintain an action for tithes in their own name, at common law, nor in any of the temporal courts; they could do so, however, in the spiritual court, or before the justices of the peace in such cases as the law empowers them to hear and determine (m).

But now by 12 & 13 Vict. c. 67, s. 1, a sequestrator may, in his own name, sue at law or in equity, or levy a distress, or take any other proceeding which might have been taken or levied by any incumbent, if the benefice had not been under sequestration.

12 & 13 Vict. c. 67.

May sue.

(g) Gibs. p. 749.

(h) Ibid.

(i) Ken. Paroch. Ant. p. 647.

(k) Gibs. p. 749; see God. App. p. 14.

(l) Vide infra, Part IV., Chap. XII., sect. 5.

(m) Johns. p. 131. See *Berwick v. Swanton*, Bunb. p. 192; *Harding v. Hall*, 10 M. & W. p. 42.

He may also sue the incumbent himself. A sequestrator appointed at the instance of a creditor cannot however be required to take any such proceeding unless security to indemnify him is given by the creditor.

By sect. 2, Payment of any sum to a sequestrator lawfully appointed with or without suit is to be a discharge as against the incumbent, and the sequestrator is to account for all sums received by him.

28 Hen. 8,
c. 11.
Supply of the
cure.

By 28 Hen. 8, c. 11, s. 3, It shall be lawful to every archbishop, bishop, archdeacon, and ordinary, their officers and ministers, to retain in their custody so much of the profits of the vacation, as shall be sufficient to pay unto such person as shall serve the cure during the vacation his reasonable stipend or salary.

By sect. 10, If the fruits of the vacation be not sufficient to pay the curate's stipend and wages for serving the cure the vacation time, the same shall be borne, and paid by the next incumbent, within fourteen days next after he has the possession of his living.

And it may be safest for the churchwardens to get it stated by the ordinary, when they take out the sequestration, what they are to pay to the curate weekly for the serving of the cure; and then there can be no contention about it when they make up their accounts (*n*).

And Dr. Gibson says, such curate ought to be duly licensed by the ordinary for serving of the cure; otherwise if he proceeds without such licence, he can have no title to a stipend or salary, nor can any be legally reserved and deducted for him (*o*).

1 & 2 Vict.
c. 106.
Stipend of
curate of
sequestered
benefice to
be paid by
sequestrator.

It is enacted by 1 & 2 Vict. c. 106, as follows:

Sect. 100. "Upon the avoidance of any benefice, by death, resignation, or otherwise, the sequestrator appointed by the bishop shall, out of the profits thereof which shall come to his hands, pay to the curate or curates appointed by such bishop to perform the ecclesiastical duties of such benefice during the vacancy thereof, such stipend or stipends as shall be ordered to be paid to him or them by such bishop, not exceeding the respective stipends allowed by this act, and in proportion only to the time of such vacancy" (*p*).

Proviso for
payment by
succeeding
incumbent
where profits
during
sequestration
insufficient.

By sect. 101, "If the profits of such benefice which shall have come to the hands of such sequestrator during the vacancy thereof shall not be sufficient to pay such stipend, the same, or so much thereof as shall remain unpaid, shall be paid to such curate by the succeeding incumbent of such benefice out of the profits thereof; and such bishop is hereby empowered and

(*n*) Wats. c. 40, p. 419; Hughes, c. 29.

(*o*) Gibs. p. 750.

(*p*) It seems that a curate appointed by the sequestrator for this

purpose, though unlicensed and with no salary fixed, may recover a reasonable sum by action against the new incumbent. *Dakins v. Seaman*, 4 M. & W. p. 777 (1842).

required, if necessary, to enforce payment of the same by monition, and by sequestration of the profits of such benefice."

By 48 & 49 Vict. c. 54, s. 10, "The bishop may assign to the curate or curates appointed to perform the duties of any benefice during the vacancy thereof such stipend or stipends as the bishop shall think fit, not exceeding for each such curate 200*l.* a-year, and in proportion only to the time of such vacancy; but so, nevertheless, that such stipend or stipends shall not exceed in the whole the net annual income of the benefice." 48 & 49 Vict. c. 54.

The successor's right to enter commences immediately upon his induction, but his right to the profits commences from the avoidance of the benefice (*q*). Successor when to enter.

As soon as a new incumbent is instituted and inducted, the sequestrators are to account to him for all the profits of the benefice which they have received during the vacancy (*r*). Sequestrators to account.

In which account they may deduct their reasonable expenses for collecting and levying the tithe rent-charge, fruits, emoluments, rents and other profits rising and growing during the vacation (*s*).

If the incumbent be dissatisfied with the account, he may bring them to account before the ordinary, by whom all things relating hereunto are properly examinable and to be determined (*t*).

By 28 Hen. 8, c. 11, s. 4, If an incumbent before his death has caused any of his glebe lands to be manured and sown at his proper costs and charges with any corn or grain, he may make his testament of all the profits of the corn growing upon the said glebe lands so manured and sown. Profits accruing when incumbent dies.

Under the old law it was decided that a parson who resigns his living was not entitled to emblements: but that his lessee was entitled to them, because the tenancy is determined by the act of another (*u*); and that the incumbent of a living might maintain ejectment against parties in possession of the glebe lands, though the current year of tenancy from year to year created by his predecessor is unexpired (*x*). Rights of lessees under incumbents.

A rector succeeded to the rectory upon the death of a former incumbent in April, 1816. A. and B. were then in possession of the glebe lands, having been tenants of the former incumbent, and they continued in possession until after December, 1816, when the rector conveyed the lands to trustees for securing an annuity; it was holden, that the latter could not maintain an ejectment against A. and B. without giving them notice to quit (*y*).

(*q*) As to the right of the widow of the incumbent, vide *infra*, p. 378.

(*r*) Wats. c. 30, p. 308.

(*s*) 28 Hen. 8, c. 11, s. 3.

(*t*) Wats. c. 30, p. 308.

(*u*) *Bulwer v. Bulwer*, 2 B. & A. p. 470.

(*x*) *Doe d. Kerby v. Carter*, Ry. & M. p. 237.

(*y*) *Doe d. Cates v. Somerville*, 6 B. & C. p. 126; 9 D. & R. p. 100.

14 & 15 Vict.
c. 25.

But it is now provided by 14 & 15 Vict. c. 25, s. 1, as follows: "Where the lease or tenancy of any farm or lands held by a tenant at rackrent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: Provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid."

Halton v.
Cove.

In *Halton v. Cove*, the defendant being an incumbent of a living with cure of souls valued at less than 8*l.* a year in the king's books, accepted another benefice without having a dispensation to hold both, whereby the presentation became void *de jure*, but he continued in possession. The bishop presented another clerk, and afterwards brought *quare impedit* and recovered against the defendant, and afterwards the new presentee was instituted and inducted. In an action by the latter against the defendant founded on the above-mentioned statute 28 Hen. 8, c. 11, s. 1, it was holden that the plaintiff could not recover the profits either from the time of his being presented or from the suing out of the *quare impedit*, the vacation contemplated by the statute being a vacation *de facto* (z).

By the Tithe Commutation Acts, tithe commutation rent-charges are apportionable between the old and new incumbent (a).

Widow of
any spiritual
person may
continue in
the house of
residence for
two months,
&c.

By 1 & 2 Vict. c. 106, s. 36, "From and after the decease of any spiritual person holding any benefice to which a house of residence is annexed, and in which he shall have been residing at the time of his decease, it shall be lawful for the widow of such spiritual person to occupy such house for any period not exceeding two calendar months after the decease of such spiritual

(z) 1 B. & Ad. p. 538.

(a) Vide *infra*, Part V., Chap. III.

person, holding and enjoying therewith the curtilage and garden belonging to such house."

This act also contains provisions for proportioning in cases of death or avoidance, the annual payment of sums raised under its authority for building houses of residence, between the incumbent avoiding by death or otherwise the benefice so charged and his successor (*b*). 1 & 2 Vict. c. 106.

SECT. 2.—*Exchange*.

Exchange is, where two persons, having procured licence from the ordinary to treat of an exchange (of which sort there are many to be found in the ecclesiastical records), do, by one instrument in writing, agree to exchange their benefices, being both spiritual (for a lay preferment, as an hospital, cannot be exchanged or go for a prebend or other spiritual benefice), and, in order thereunto, do resign them into the hands of the ordinary; such exchange being executed, the resignations are good (*c*). Exchange.

But though the one is instituted and inducted into the other's benefice, yet if the exchange be not executed on both parts, the clerk on whose part the exchange was not executed may have his benefice again; for in this case of exchanging, the law annexes this condition to a resignation, viz., if it be fully executed (*d*). When not complete.

Thus where one is both instituted and inducted, and the other is only instituted, and dies or *refuses to finish* (*e*); in this case, though they have proceeded so far, yet the resignation and all that followed upon it shall be void, and both (if both are living) may return to their former benefices upon the foot of former possession; or if one dies before he is inducted, and after the induction of the other, this induction and all that went before shall be void, because the exchange was not fully executed during the lives of the parties (*f*).

And this is agreeable to the reason of the common law; for at the common law, if a man exchange lands, and the lands he receives in exchange be evicted, he may repair to his own lands, and re-enter upon them (*g*).

In *Rumsey v. Nicholl* (*h*), the plaintiff sought to regain the *Rumsey v. Nicholl.*

(*b*) Sect. 68, vide post, Part V., Chap. II.

(*c*) Wats. c. 4, p. 28; Gibs. p. 821. As to questions of dilapidations arising on exchanges, see *Downes v. Craig*, 9 M. & W. 166; et infra, Part V., Chap. V.

(*d*) Wats. c. 4, p. 28.

(*e*) Bp. Gibson gives no authority which supports the words in italics.

(*f*) Gibs. p. 821; *Colt v. Bp. of Coventry*, Hob. p. 152.

(*g*) Degge, pt. 1, ch. 14. But if there be a triple exchange of lands, this is not the law, *Provost of Eton v. Bp. of Winchester*, 3 Wils. p. 403.

(*h*) 2 C. P. D. pp. 179, 294. See the next chapter, and see *Reichel v. Bp. of Oxford*, 35 Ch. D. p. 48; 14 App. Ca. p. 259.

benefice of Llandough, and alleged in his statement of claim that he had resigned the benefice in order to effect an exchange with another clerk, that he had done so with the knowledge and consent of the patron and bishop, and had stated to the bishop's registrar when he delivered the resignation that his only object and intention in resigning was to effect this exchange, and that if it was not effected the resignation was to be null. He then alleged that the patron had refused to present the clerk with whom the exchange was to be made, and had instead presented the defendant. It was decided on demurrer by Denman, J., and affirmed by the Court of Appeal, that the resignation was complete on the bishop's acceptance, and had made the living vacant, and that the plaintiff could not recover. After this decision it will be better to adopt the old form in the register (*i*) and state that the resignation is made *ex causa permutationis*, with a view to an exchange.

31 Eliz. c. 6.

By 31 Eliz. c. 6, s. 7, "If any incumbent of any benefice, with cure of souls . . . do or shall corruptly resign or exchange the same; or corruptly take for or in respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money, or benefit whatsoever": "then as well the giver, as the taker, of any such pension, sum of money or other benefit corruptly, shall lose double the value of the sum so given, taken, or had."



SECT. 3.—*Plurality and Commendam.*

Pluralities
always dis-
countenanced.

The holding of more benefices, with cure of souls, than one together was always discountenanced by the church. Since the Council of Lateran, A.D. 1215, it was, apparently, effectually prevented by the provision that the taking of such a second benefice should make the first vacant (*k*). But the practice of giving dispensations grew to such a height in the unreformed church, and remained so unimproved in the reformed church, that it has been necessary for parliament to intervene, and various acts have been passed with regard to this subject. Those now in force are 1 & 2 Vict. c. 106; 13 & 14 Vict. c. 98, and 48 & 49 Vict. c. 54. These acts, however, admit certain cases in which two benefices may well be held together. The whole subject will be found treated later on in this work as part of the discipline of the clergy (*l*). A device for escaping the law against plurality was the holding of a benefice in commendam.

Commendam,
what.

A benefice or ecclesiastical living, which being void, to prevent its remaining void, *commendatur*, is committed to the charge and care of some sufficient clerk, to be supplied until it may be con-

(*i*) Registrum Brevium, p. 306b.

(*k*) *Burder v. Mavor*, 6 N. C. p. 1; 1 Roberts. p. 614; vide supra,

p. 14.

(*l*) Part IV., Chap. III., sect. 6.

veniently provided of a pastor is said to be held in commendam. Thus, when a parson of a parish is made the bishop of a diocese, there is a cession of his benefice by the promotion; but if the king gave him power to retain his benefice, he continued parson thereof, and was said to hold it in commendam (*m*). The words "to prevent its becoming void," are not in Godolphin, and seem to have been added to the definition to make it extend to commendams *retinere*, which Lord Hobart says are not properly commendams, though usually called so, but merely faculties to retain, for according to him there is no difference between a commendam and a presentation, but that the one presents the parson to the church, the other commits the church to the parson. According to the same authority, commendams are of three degrees: one, *semestris*, that the church may not be without a parson during the patron's respite of six months; another *perpetua*, or for life; the third *limitata*, or temporary, which limitation however is not allowed in commendams *capere* (*n*).

There are constitutions of Othobon and of Archbishop Peccham restraining the acquisition of commendams (*o*). But it does not seem necessary now to give these in detail.

For by 6 & 7 Will. 4, c. 77, s. 18, it is enacted that "After the passing of this act no ecclesiastical dignity, office or benefice shall be held in commendam by any bishop, unless he shall so hold the same at the time of passing thereof; and that every commendam thereafter granted, whether to retain or to receive, and whether temporary or perpetual, shall be absolutely void to all intents and purposes."

Abolition of
commendam
in case of
bishops.

SECT. 4.—*Sinecure*.

The origin of sinecures was thus:—

Sinecures,
origin of.

The rector (with proper consent) had a power to entitle a vicar in his church to officiate under him, and this was often done; and by this means, two persons were instituted to the same church, and both to the cure of souls, and both did actually officiate. So that however the rectors of sinecures, by having been long excused from residence, are, in common opinion, discharged from the cure of souls (which is the reason of the name), and however the cure is said in the law books to be in them *habitualiter* only, yet, in strictness, and with regard to their original institution, the cure is in them *actualiter*, as much as it is in the vicar (*p*).

(*m*) God. p. 230.

(*n*) *Colt v. Bp. of Coventry*, Hob. pp. 144, 153, where much learning on this subject is to be found; *S. C.* 1 Rolle, p. 451; and Mo. p. 898. See *Le case de Com-*

mendam, Davis, p. 68.

(*o*) Othobon, Athon. pp. 131, 132; Lind. p. 136; and see Gibs. p. 914; VI. i. 6, 15.

(*p*) Gibs. p. 719; Johns. p. 93.

That is to say, where they come in by institution ; but if the rectory is a donative, the case is otherwise, for there coming in by donation they have not the cure of souls committed to them. And these are most properly sinecures according to the genuine signification of the word (*q*).

No sinecure where there is but one incumbent.

But no church, where there is but one incumbent, is properly a sinecure. If, indeed, the church be down, or the parish become destitute of parishioners, without which divine offices cannot be performed, the incumbent is of necessity acquitted from all public duty, but still he is under an obligation of doing this duty, whenever there shall be a competent number of inhabitants, and the church shall be rebuilt. And these benefices are more properly depopulations than sinecures (*r*).

Bishoprics, deaneries, archdeaconries, prebends.

Bishoprics, deaneries, and archdeaconries were of old generally said to have the cure of souls belonging to them ; some have said the same of prebends, but with less reason. Bishops have the cure of their whole dioceses, and archdeacons do in many particulars share with them in their spiritual cures. The dean was said to have the cure of his canons, and of the rest belonging to the choir, who were all in old time to make their confessions to him, and receive absolutions from him ; but it does not appear that the canons or prebendaries have or had the cure of souls in this or any other respect. They are indeed for the most part instituted, but not to the cure of souls (*s*).

Possession of sinecures, how obtained.

Possession of sinecures (not being exempt as is aforesaid) must be obtained by the same methods by which the possession of other rectories and vicarages is obtained, namely, by presentation, institution, and induction. And the reason is, because the vicarage had not its beginning by appropriation and endowment (which was a discharge to the parson from the cure), but by intitulation, that is, by being admitted to a title, or a share in the profits and cure of the rectory, together with the rector, and in subordination to him as vicar. For although by a constitution of Archbishop Langton there might not be two rectors or parsons in one church, yet there might be, and sometimes were, established in the same church both a rector and vicar with cure of souls : and in such case, the rectory came to be a sinecure, not because it was really so in law, but because the rectors got themselves excused from residence, and by degrees devolved the whole spiritual cure upon the vicars (*t*).

Not within the statutes &c. pluralities.

Upon which ground, the possessors of sinecures were not bound to read the Thirty-nine Articles by 13 Eliz. c. 12. And in this only, institution to sinecures differed from institution to other benefices (*u*).

its remures are not within the act 1 & 2 Vict. c. 106, as they care of it within the old act against pluralities, such livings

(q) Registru 93.

(r) Ibid. *der* v

(s) Ibid. p. *rts.* vide supra, p.

225.

(t) Gibs. p. 818.

(u) Johns. p. 93.

being not by the said statute deemed incompatible; but only those to which the cure of souls is actually and not only habitually annexed (*x*).

By 3 & 4 Vict. c. 113, it is enacted as follows:—

Sect. 48. "All ecclesiastical rectories without cure of souls in the sole patronage of her Majesty, or of any ecclesiastical corporation, aggregate or sole, where there shall be a vicar endowed or a perpetual curate, shall . . . be suppressed; and as to any such ecclesiastical rectory without cure of souls, the advowson whereof or any right of patronage wherein shall belong to any person or persons or body corporate other than as aforesaid, the ecclesiastical commissioners for England shall be authorized and empowered to purchase and accept conveyance of such advowson or right of patronage, as the case may be, at and for such price or sum as may be agreed upon between them and the owner or owners of such advowson or right of patronage, and may pay the purchase-money and the expenses of and attendant upon such purchase out of the common fund herein-after mentioned; and after the completion of such purchase of any such rectory, and upon the first avoidance thereof, the same shall be suppressed; and upon the suppression of any such rectory as aforesaid all ecclesiastical patronage belonging to the rector thereof as such rector shall be absolutely transferred to and be vested in the original patron or patrons of such rectory."

3 & 4 Vict.
c. 113.

Suppression
of sinecure
rectories.

Sect. 54. "Upon the suppression of any ecclesiastical rectory without cure of souls all the estate and interest which the rector thereof, or his successor, has or had, or would have or have had, as such rector, in any lands, tithes or other hereditaments or endowments whatsoever, shall, without any conveyance thereof, or any assurance in the law other than the provisions of this act, accrue to and be vested in the ecclesiastical commissioners for England and their successors for the purposes of this act."

Endowments
of suppressed
sinecure
rectories
vested in
ecclesiastical
commis-
sioners.

Sect. 55. "If in any case it shall appear to be expedient, on account of the extent or population or other peculiar circumstances of the parish or district in which any such rectory without cure of souls shall be situate, or from the incompetent endowment of the vicarage or vicarages or perpetual curacy or curacies, dependent on such rectory, to annex the whole or any part of the lands, tithes or other hereditaments or endowments belonging to such rectory to such vicarage or vicarages, curacy or curacies, such annexation may be made, and any such vicarage or curacy may be constituted a rectory with cure of souls by the authority hereinafter provided; and wherever any rectory heretofore deemed a rectory without cure of souls has been held together with the vicarage dependent thereon for the period of twenty years last past, the same shall not be construed to be a rectory without cure of souls within the meaning of this act, but such

As to certain
sinecure
rectories.

last-mentioned rectory and vicarage shall continue and be permanently united and shall be a rectory with cure of souls; subject nevertheless to all the provisions of the thirdly-recited act (*y*), and to the provisions of this act which relate to the division of benefices or the apportionment of the incomes thereof.

Annexation
of sinecures to
cures of souls.

Sect. 71. "With respect to any benefice with cure of souls which is held together with or in the patronage of the holder of any prebend or other sinecure preferment belonging to any college in either of the universities, or to any private patron, arrangements may be made by the like authority and with the consents of the respective patrons, for permanently uniting such preferment with such benefice: provided that this act shall not apply to or affect any prebend or other sinecure preferment in the patronage of any college or of any lay patron in any other manner than is herein expressly enacted."

(*y*) 1 & 2 Vict. c. 106.

CHAPTER XIII.

RESIGNATION OF BENEFICES.

IN this chapter the grave subject of the resignation of an office or benefice by a priest is considered (*a*).

A resignation is where a parson, vicar, or other beneficed clergyman, voluntarily gives up and surrenders his charge and preferment to those from whom he received the same (*b*).

Resignation,
what.

That ordinary who has the power of institution has power also to accept a resignation made of the same church to which he may institute; and therefore the respective bishop or other person, who, either by patent under him, or by privilege or prescription, has the power of institution, is the proper person to whom a resignation ought to be made (*c*). And yet a resignation of a deanery in the king's gift may be made to the king, as of the deanery of Wells; and some hold, that the resignation may well be made to the king of a prebend that is no donative; but others, on the contrary, have held, that a resignation of a prebend ought to be made only to the ordinary of the diocese, and not to the king, as supreme ordinary, because the king is not bound to give notice to the patron (as the ordinary is) of the resignation; nor can the king make a collation by himself without presenting to the bishop, notwithstanding his supremacy (*d*).

To whom to
be made.

And resignation can only be made to a superior: this is a maxim in the temporal law, and is applied by Lord Coke to the ecclesiastical law, when he says, that therefore a bishop cannot resign to the dean and chapter (*e*), but it must be to the metropolitan, from whom he received confirmation and consecration (*f*).

And it must be made to the next immediate, and not to the mediate superior; as of a church presentative, to the bishop and not to the metropolitan (*g*).

(*a*) The resignation of bishops has been already considered, Part II., Chap. II.; and of deans and canons, Part II., Chap. IV., sect. 5.

(*b*) Degge, pt. 1, ch. 14. See Wats. c. 4, p. 17; *Fairchild v. Gaire*, Dyer, p. 294 (*a*) n. 6.

(*c*) "Ad eum fieri debet renunciatio ad quem spectat confirmatio." Inst. Juris. Can. i. 19.

(*d*) 2 Roll. Abr. p. 358; Wats. c. 4, p. 29.

(*e*) 1 Roll. p. 135.

(*f*) Gibs. p. 822. On this account the validity of the resignation of Pope Celestine V. was doubted. See Dante Paradiso, Canto xxvii., l. 24, and the note in Scartazzini's edition (1874).

(*g*) 2 Roll. Abr. p. 358.

But donatives are not resignable to the ordinary, but to the patron who has power to admit (*h*).

And if there be two patrons of a donative, and the incumbent resign to one of them, it is good for the whole (*i*).

Whether it
must be made
in person.

Regularly, resignation must be made in person, and not by proxy. There is, indeed, a writ in the register, entitled, *Littera procuratoria ad resignandum*, by which the person constituted proctor was enabled to do all things necessary to be done in order to an exchange; and of these things, resignation was one. And Lindwood supposes that any resignation may be made by proctor, and herewith the canon law agrees (*k*). But in practice there is no way (as it seems) of resigning, but either by personal appearance before the ordinary, or at least elsewhere before a public notary, by an instrument directed immediately to the ordinary, and attested by the said notary, in order to be presented to the ordinary by such proper hand as may pray his acceptance. In which case the person presenting the instrument to the ordinary does not resign *nomine procuratorio*, as proctors do, but only presents the resignation of the person already made (*l*).

In the case of *Heyes v. Exeter College Oxford* (*m*), the defendant Vye, by an instrument in the usual form, attested by a notary public, and directed to the Bishop of Exeter, expressed his resignation of the vicarage of Merthoe, in the county of Devon, and two other notaries public were constituted by him as his proctors to exhibit the same to the bishop. The instrument was sent by the post to the bishop, who merely indorsed it, and signed a memorandum of his acceptance of the resignation, which was held to be sufficient, though no public act.

Must be absolute and not conditional.

Dr. Burn says that a collateral condition may not be annexed to the resignation, any more than an ordinary may admit upon condition, or a judgment be confessed upon condition, which are judicial acts.

For the words of resignation have always been *purè, sponte, absolutè et simpliciter*, to exclude all indirect bargains, not only for money but for other considerations. And therefore in *Gayton's case*, in 34 Eliz., where the resignation was to the use of two persons therein named, and further limited with this condition, that if one of the two was not admitted to the benefice resigned within six months, the resignation should be void and of none effect; such resignation, by reason of the condition, seems to have been declared to be absolutely void (*n*).

But where the resignation is made for the sake of exchange only, there it admits of this condition, viz., if the exchange shall

(*h*) Gibs. p. 822.

(*i*) Degge, pt. 1, ch. 14.

(*k*) Inst. Juris Can. i. 19.

(*l*) Gibs. 822; Degge, pt. 1, ch. 14. The law in this passage must now be taken to be qualified by *Reichel v. Bp. of Oxford*, 35 Ch.

D. p. 48; 14 App. Ca. p. 259.

(*m*) 12 Ves. p. 336.

(*n*) Owen, p. 12; God. p. 277;

Gibs. p. 821; 1 Stillingfleet, Ecel. Cas. p. 334. A Discourse concerning bonds of resignation, p. 67.

take full effect and not otherwise, as appears by the form of resignation which is in the register (*p*).

In the case of *Reichel v. The Bishop of Oxford* (*q*), it was decided by the House of Lords, affirming the decision of the Court of Appeal, that a resignation need not be made before a notary, and that when once made and agreed to by the bishop it cannot be withdrawn, although there has been no formal acceptance by the bishop, and although by arrangement the formal acceptance is to be of a later date; and finally, that an arrangement so to postpone final acceptance does not make the resignation simoniacal or otherwise void.

Reichel v. The Bishop of Oxford.

By a constitution of Othobon, "Whereas sometimes a man resigns his benefice that he may obtain a vacant see, and bargains with the collator, that if he be not elected to the bishopric, he shall have his benefices again, we do decree, that they shall not be restored to him, but shall be conferred upon others, as lawfully void; and if they be restored to him, the same shall be of no effect; and he who shall so restore him, after they have been resigned into his hands, or shall institute the resigner into them again, if he is a bishop he shall be suspended from the use of his dalmatic and pontificals, and if he is an inferior prelate he shall be suspended from his office, until he shall think fit to revoke the same" (*r*).

No resignation can be valid till accepted by the proper ordinary; that is, no person appointed to a cure of souls can quit that cure, or discharge himself of it, but upon good motives, to be approved by the superior who committed it to him, for it may be he would quit it for money, or to live idly, or the like. And this is the law temporal as well as spiritual, as appears by that plain resolution which has been given, that all presentations made to benefices resigned before such acceptance are void. And there is no pretence to say, that the ordinary is obliged to accept, since the law has appointed no known remedy, if he will not accept any more than if he will not ordain (*s*).

Must be accepted by the proper ordinary.

Lindwood makes a distinction in this case, between a cure of souls and a sinecure. The resignation of a sinecure, he thinks, is good immediately, without the superior's consent, because none but he that resigns has interest in that case; but where there is a cure of souls it is otherwise, because not he only has interest, but others also unto whom he is bound to preach the word of God: wherefore in this case it is necessary that there be the ratification of the bishop, or of such other person as has power by right or custom to admit such resignation (*t*).

Thus, in *The Marchioness of Rockingham v. Griffith* (1755) (*u*),

Who may accept or refuse.

(*p*) *Gibs.* p. 821. Vide supra, p. 379.

(*q*) 35 Ch. D. p. 48; 14 App. Ca. p. 259; and see *Reichel v. Magrath*, 14 App. Ca. p. 665.

(*r*) Othobon, Athon, p. 134.

(*s*) *Gibs.* p. 822; 1 Stillingfleet, Eccl. Cas. p. 334. A Discourse concerning bonds of resignation, p. 66.

(*t*) *Gibs.* p. 823.

(*u*) Bac. Abr. vol. 2, p. 317.

the lord chancellor held, that the acceptance of a resignation by the ordinary is necessary to make it effectual, and that it is in the power of the ordinary to accept or refuse a resignation.

And in *Hesket v. Grey* (28 Geo. 2) (x), where a general bond of resignation was put in suit, and the defendant pleaded that he offered to resign, but the ordinary would not accept the resignation, the Court of King's Bench were unanimously of opinion, that the ordinary is a judicial officer, and is intrusted with a judicial power to accept or refuse a resignation as he thinks proper.

Whether the ordinary may refuse to accept a resignation without assigning any cause, or whether in such case he may be compelled to assign a sufficient cause, is undecided.

Corrupt
resignation.

By 31 Eliz. c. 6, s. 7, "If any incumbent of any benefice with cure of souls . . . do or shall corruptly resign or exchange the same; or corruptly take for or in respect of the resigning or exchanging the same, directly or indirectly, any pension, sum of money or benefit whatsoever:" "as well the giver as the taker, of any such pension, sum of money, or other benefit corruptly, shall lose double the value of the sum so given, taken or had."

Any Pension.—Before this statute, the bishop, in cases of resignation, might, and did frequently, assign a pension during life, out of the benefice resigned, to the person resigning (y).

And by 26 Hen. 8, c. 3, for payment of first fruits and tenths, it was enacted by sect. 18, that incumbents charged with pensions payable to their predecessors during their lives, should deduct the tenth part thereof out of such payment, inasmuch as they were charged by the said act to pay the tenths of their whole living unto the king.

And by sect. 19 of the same act it was provided, that no pension thereafter should be assigned by the ordinary, or by any other manner of agreement by collateral security or otherwise, upon any resignation of any dignity, benefice or promotion spiritual, above the value of the third part of the dignity, benefice or promotion spiritually resigned.

Fec.

By the Order in Council of the 24th of July, 1857, mentioned above (z), where an instrument of resignation is drawn by the bishop's secretary, his fee is one guinea.

Lapse.

After acceptance of the resignation, lapse shall not run but from the time of notice given; it is true, the church is void immediately upon acceptance, and the patron may present if he please; but as to lapse, the general rule that is here laid down is the unanimous doctrine of all the books. Inasmuch that if the bishop who accepted the resignation, dies before notice given, the six months shall not commence till notice is given by the guardian of the spiritualities, or by the succeeding bishop, with whom the act of resignation is presumed to remain (a).

(x) Amb. p. 268.

(y) Gibs. p. 822.

(z) Page 357, supra.

(a) Gibs. p. 823; vide supra,
p. 367.

General resignation bonds which are now decided to be unlawful, and bonds permitted in special cases under the statute of George IV. will be noticed hereafter in connection with simony (*b*). Resignation bonds.

Provisions for bestowing pensions in certain cases upon incumbents on their resignation have now been made by The Incumbents' Resignation Act, 1871 (34 & 35 Vict. c. 44), in the following terms. 34 & 35 Vict. c. 44.

By sect. 5, "On a representation being made to the bishop (*bb*) in the form contained in Schedule A. to this act, by the incumbent of any benefice (*c*), provided he has been the incumbent of such benefice for seven years continuously, that he desires, on the ground that he is incapacitated by permanent mental or bodily infirmity from the due performance of his duties, to retire from his benefice under the provisions of this act, in that case it shall be lawful for the bishop, if he see fit, to cause a commission to be issued under his hand and seal, addressed to five persons, to be nominated as hereinafter mentioned, authorizing and requiring them to inquire into and report to him upon the truth of the ground alleged, and upon the expediency of the resignation of the said incumbent; and it shall be lawful for such commissioners to inquire into and report upon all such matters in anywise affecting such resignation, or connected therewith, as they may deem necessary; and the commissioners shall make their return to the commission within three months from the issuing of the commission, or within such enlarged time as the bishop shall, by writing under his hand and seal, from time to time direct." How the provisions of the act are to be put into exercise.

Commissioners to inquire and report.

"SCHEDULE A.

"To the Right Reverend the Lord Bishop of _____.

"I, _____, being now, and having been for the last seven years continuously, rector [vicar, *or* incumbent] of _____, within your lordship's diocese, hereby represent to your lordship, that I, finding myself incapacitated, by permanent mental or bodily infirmity (*as the case may be*), from the due performance of the duties of my office, am desirous of resigning the aforesaid benefice, on being allowed to receive a pension out of the revenues of the same.

"Accordingly, I respectfully request your lordship to issue a commission under the provisions of the Incumbents' Resigna-

(*b*) *Infra*, Part IV., Chap. III., sect. 3.

(*bb*) The term "bishop" shall, with reference to any benefice, mean the bishop or archbishop for the time being within whose diocese such benefice is locally situate, and during the vacancy of any episcopal see the term "bishop" shall mean the archbishop of the province in

which such see is comprehended.

(*c*) The term "benefice" shall comprehend all rectories with cure of souls, vicarages, new vicarages, perpetual curacies, donatives, endowed public chapels, parochial chapelries and chapelries with or without districts annexed or belonging to them.

tion Act, 1871, to inquire and report, as provided by the said act, upon the expediency of my proposed resignation.

"As witness my hand, this day of in the year of
our Lord 18 ." (L.S.)

Who are to
be commis-
sioners.

Sect. 6. "One of the five commissioners shall be the archdeacon of an archdeaconry or the rural dean of a rural deanery of the diocese wherein the benefice is situate, as the bishop may determine; one other of the commissioners shall be an incumbent of the same diocese, nominated by the incumbent wishing to retire; one other of the commissioners shall be an incumbent of the same diocese, nominated by the bishop; one other of the commissioners shall be a magistrate being in the commission of the peace for the county wherein the benefice is situate, and a member of the Established Church of England, nominated by the person who has presided as chairman of the last preceding quarter sessions for the county or division of the county, or if there be no such person, then by the lord lieutenant of the county; and the remaining commissioner shall be nominated by the patron (*d*), or, in the case of alternate patronage, jointly by both or all of the patrons, or in case of difference by the patron entitled to the next presentation."

Notice of
intention to
issue com-
mission.

Sect. 7. "Notice of the intention to issue such commission shall be delivered or sent by the bishop to the incumbent, patron, chairman of quarter sessions, or lord lieutenant of the county, as the case may be, and the churchwardens of any such benefice respectively; and such commission shall not issue until the expiration of one month from the delivery or sending of such notices. The notice to the patron and chairman of quarter sessions or lord lieutenant shall require such patron and chairman or lord lieutenant respectively to nominate a commissioner by sending his name and address in writing to the bishop within one month from the date of such notice; and if such patron or chairman or lord lieutenant respectively shall omit to nominate a commissioner within the time limited, the bishop may nominate a commissioner instead of such patron, chairman, or lord lieutenant respectively; and when and so soon as such commission shall be issued, notice of such commission shall be delivered or sent by the bishop to each commissioner and to the churchwar-

(*d*) The term "patron" shall, with reference to any benefice, mean the person or persons or corporation who, in case such benefice were vacant, would be entitled to present thereto; but if the right to present to such benefice shall be vested in different persons or corporations, whether jointly or by way of alternate presentations, the term patron shall (unless the context requires otherwise) comprehend both or all such different persons

or corporations in whom such right of joint or alternate presentations shall for the time being be vested; and as regards the patrons referred to in sections 126, 127, and 128 of the Act 1 & 2 Vict. c. 106, the actions of or towards such patrons required by this act shall be performed in the manner stated in such sections 126, 127, and 128, as if the said sections were here repeated and made applicable to the provisions of this act.

dens of the benefice. Service by prepaid letter shall be sufficient service of all notices and documents under this act."

Sect. 8. "The commissioners shall give seven days' notice of their first meeting, affixed to the usual place of public notices in the church of the benefice. Three of the commissioners shall constitute a quorum, and the commissioners at a meeting of them duly constituted may examine on oath, if they see fit, the persons who are desirous or willing to be examined by them, touching any matter relating to the object of the commissioners, and may administer the oaths necessary for that purpose, and the commissioners shall in their return to the commission certify all such matters and things as shall appear to them material, together with their opinion as to the expediency or otherwise of the proposed resignation, and, if they or at the least any three of them deem the resignation expedient, shall specify the amount of pension which in their opinion ought to be allowed out of the revenues of the benefice to the retiring incumbent; provided that in no case shall such pension exceed one-third part of the annual value of the benefice resigned."

Commissioners may examine on oath.

Limitation of pension.

In *Robinson v. Dand* (e), it was decided in 1886, that the amount of a pension once fixed could not be reduced because by reason of agricultural depression and the conversion of part of the parish into a district chapelry, the annual value of the benefice was so reduced that the pension exceeded one-third part.

Robinson v. Dand.

Since this decision the Incumbents' Resignation Act, 1887 (50 & 51 Vict. c. 23), has been passed.

50 & 51 Vict. c. 23.

By sect. 4 of this act, "In the case of every pension awarded under this act, the amount of every half-yearly payment on account of such pension shall vary, and shall from time to time be regulated by the averages published under 6 & 7 Will. 4, c. 71, in the month of January next preceding the date of every such half-yearly payment, except that if no part of the income of the benefice is derived from tithe rent-charge or glebe lands, then the pension shall not be subject to variation."

Further limitations of pension.

By sect. 5, "Section 8 of the principal act shall be read as if the following words were added at the end of the section:—'or be an amount which shall not leave a sufficient income to secure the due performances of the service of the church according to the scale of stipends set forth in section 85 of 1 & 2 Vict. c. 106'" (f).

Returning to the 34 & 35 Vict. c. 44—

By sect. 9, "If the return to the commission shall certify the resignation to be expedient, and the patron shall in writing have consented or shall not within one calendar month thereafter in writing refuse his consent thereto, the bishop shall proceed as is hereinafter provided; but if the patron shall so refuse his

34 & 35 Vict. c. 44.

Who to consent to deed of resignation.

(e) 17 Q. B. D. p. 341.

(f) Vide infra, Part II., Chap. XV.

consent, the return to the commission shall be laid before the archbishop of the province, who shall, within one calendar month, give his decision in writing whether such resignation shall or shall not be accepted, which decision shall be final. If the patron shall have declared his consent or have not refused it as aforesaid, or if the archbishop shall decide that the resignation shall be accepted, the bishop shall cause a declaration as in Schedule B. (g) to be prepared, inserting therein the amount of pension so allowed out of the revenues of the benefice to the retiring incumbent, and the day, not being less than one month after the date of the declaration, when the incumbency shall be void and the pension shall commence, and the times of payment, not being oftener than twice a year, and shall sign the same in triplicate in the presence of one witness, and shall cause one copy thereof to be delivered or sent prepaid by post to the patron of the benefice, and another copy thereof to be delivered or sent in like manner to the incumbent of the same, and the third copy to be filed in the registry of the diocese, and such declaration shall be the title deed of the retiring incumbent to the pension assigned therein to him; provided that no benefice shall at any time be subject to the payment of more than one pension."

SCHEDULE B.

"Whereas on the day of , in the year of our Lord, 18 , a commission was issued by us, the bishop of , under the provisions of the Incumbents' Resignation Act, 1871, on the representation of the Rev. , incumbent of , within the diocese aforesaid, and in their return thereto the commissioners stated that in their opinion the resignation of the said was expedient, and that a pension of pounds per annum out of the revenues of the said benefice should be allowed to the said Rev. on his retirement therefrom: And whereas the patron has consented, or not refused his consent, to such resignation, [or] the archbishop has determined that such resignation shall be accepted.

"We , by divine permission bishop of do declare the said benefice void of the person of the said Rev. , to all intents and purposes of the law, on and after the day of subject nevertheless to the payment by half-yearly payments from the day of next, out of the revenues thereof, of the said yearly pension of pounds, the first of which half-yearly payments shall be payable on , and future half-yearly payments at periods of six months from such day, or such other sum as may hereafter be assigned under the provisions of the said act unto the said for his life, or such

(g) This declaration was adjudged, stamp duty: *ex relatione*, Mr. C. in 1889, by the Commissioners of Brown Smith, solicitor.
Inland Revenue to be free from

less period as hereafter may be assigned by law and endorsed hereon.

"As witness our hand this day of in the year 18 .

"Witnesses to the signature of the bishop ."

Sect. 12. "After the filing of such declaration as aforesaid the benefice shall, *ipso facto*, be vacant on the day fixed in such declaration; and the patron thereof shall be entitled to present a clerk for the same as if it had been vacated by the death of the incumbent thereof, and the clerk who shall be collated, instituted, or licensed thereto shall be entitled to the revenues of the same, subject nevertheless to the payment to the retired clerk of such sum as may be allowed to him as pension; and such clerk shall have the same right and claim in respect of dilapidations as if the benefice had been vacated by the death of the incumbent thereof."

Patron to present to resigned benefice.

Sect. 18. "The right of resignation and of doing any act leading to, connected with, or consequent on such resignation by this act given to an incumbent, may, if the incumbent be a lunatic found such by inquisition, be exercised in his name and on his behalf by the committee of his estate."

Resignation by lunatic.

Sect. 4. "The sum assigned as a pension to a retiring incumbent under this act shall not be deemed a pension, sum of money, or benefit within the meaning of the 31 Eliz. c. 6, or the 12 Anne, stat. 2, c. 12, or any other act" (*h*).

Sect. 10. "The pension so allowed shall be a charge upon the revenues of the benefice, and shall be recoverable as a debt at law or in equity from the incumbent of the said benefice by the retired clerk, his executors, administrators, or assigns, but such pension shall not be transferable at law or in equity."

Pension to be a charge on the benefice.

In conformity with this last provision, it was decided in *Gathercole v. Smith* (*i*), by the Court of Appeal, affirming Jessel, M. R., that a judgment debt could not be set off against the claim for the pension. But by sect. 6 of the Incumbents' Resignation Act, 1887, dilapidations due to the successor can be set off; only not more than half the pension can be thus set off in any one year without the consent of the bishop.

Gathercole v. Smith.

By sect. 11, as amended by sect. 5 of the Incumbents' Resignation Act, 1887, "The annual value of a benefice for the purposes of this act shall be the net annual value exclusive of the parsonage, vicarage, or other place of residence of the incumbent, after deducting all rates, taxes and charges assessed upon and payable out of the benefice, which charges shall include the salary of any curate who is compulsorily employed, and any annual payments in respect of any terminable mortgage (*j*), having at the time of the sitting of the said commission, more than two years to run."

Annual value of benefice.

(*h*) Vide infra, Part V., Chap. VII.
 (*i*) 17 Ch. D. p. 1; and see *Gather-*

cole v. Smith, 7 Q. B. D. p. 626.

(*j*) "Terminable mortgage" means any mortgage created for

Parsonage house to belong to new incumbent.

Sect. 14. "It shall in no case be lawful to assign the house of residence of the incumbent as any part or the whole of the pension for a retired clerk; but such house of residence shall belong to and be enjoyed by the incumbent of the benefice as if the benefice were free from all claim by a retired clerk."

Pension to cease or to be altered under certain circumstances.

Sect. 15. "The right of a retired clerk to the pension assigned to him shall cease upon the enrolment of any deed of relinquishment by the clerk under the 33 & 34 Vict. c. 91 (*k*), or on and after the day on which he is admitted to another benefice; and in the event of any retired clerk undertaking clerical duties elsewhere than within the benefice from which he retired, it shall be lawful for the incumbent of the benefice to bring the same to the notice of the bishop, who shall cause inquiries to be made into the facts, and upon his being satisfied that such retired clerk is or has been undertaking such clerical duties and receiving a remuneration for the same, it shall be competent for such bishop to determine whether the pension payable to such retired clerk shall cease or be diminished in any and what proportion or for any and what period: Provided always, that such retired clerk may, within one month after a notice of the determination of the bishop shall have been sent to him by post, appeal to the archbishop of the province, who shall confirm, annul, or vary the decision of the bishop as to such archbishop shall appear just and proper, and the cessation of or the alteration, if any, made in the pension shall be stated by endorsement on the declaration filed in the registry, and the title of the retired clerk to receive and the liability of the existing incumbent to pay a pension out of the revenues of the benefice shall cease or be altered in accordance with such endorsement, and a copy of such endorsement signed by the bishop shall be delivered on application to the incumbent and patron of the benefice."

Expenses of inquiry.

Sect. 16. "If a commission under this act be issued on the representation of an incumbent, and the return thereto shall state that in the opinion of the commissioners the ground for resignation of the incumbent is not proved, or the retirement of the incumbent is not expedient, then in such case all the expenses which shall have been incurred by or with the sanction or by the direction of the bishop in or towards carrying the provisions of this act into execution shall be defrayed by the incumbent, and shall be recoverable from him by or for the bishop as debts in and by course of law. If the return to the commission issued on the aforesaid representation shall state that in the opinion of the commissioners the retirement of the incumbent is expedient, then one moiety of the expenses incurred by or with the sanction or under the direction of the bishop in

securing the repayment of any loan by annual instalments, payments in the nature of a rent-charge or otherwise, in a limited number of years.

(*k*) The Clerical Disabilities Act, 1870. Vide *infra*, Part II., Chap. XVIII., sect. 6, and Part IV., Chap. III., sect. 7.

or towards carrying the provisions of this act into execution shall be defrayed by the incumbent whose retirement is recommended, and the other moiety shall be a charge on the revenues of the benefice, and shall be recoverable as a debt at law or in equity from the incumbent thereof by or for the bishop."

Sect. 17. "The costs incurred by any secretary of a bishop and any registrar of a diocese in carrying into execution the provisions of this act shall be fixed and regulated in accordance with and in the manner specified in the provisions of the 131st section of 1 & 2 Vict. c. 106, as if the duties required of such secretary and registrar under this act had been specified in the said recited act" (*l*). Costs incurred by registrar, &c.

It should be observed, that under sect. 13 the pensioned clerk still remains amenable to ecclesiastical discipline, and provision is made for such discipline being executed in such cases. Discipline.

(*l*) Vide *supra*, p. 357.

CHAPTER XIV.

UNION AND DISUNION OF BENEFICES.

- SECT. 1.—*The Union of Churches and Benefices.*
 2.—*The Union of several Benefices in one Church.*
 3.—*The Annexion of Districts to Benefices.*
 4.—*The Disunion of Benefices.*

Division of
subject.

THE subject of this chapter divides itself into four parts: (1.) The Union of Churches and Benefices; (2.) The Union of several Benefices in one Church; (3.) The Annexation of Districts to Benefices; (4.) The Disunion of Benefices.

SECT. 1.—*The Union of Churches and Benefices.*

Causes of
union.

The union or consolidation of benefices ought to be founded upon good and canonical reasons. And the principal reasons assigned by the canon law are, for hospitality, nearness of the places, want of inhabitants, poverty or smallness of the living. Which circumstances are specially inquired into before the union, and (some or all of them, as the case is) are recited in the preamble to the act of union (*a*).

And in such case it has been sometimes said that by the common law of the realm the ordinaries, patrons and incumbents may make a consolidation of the two churches into one (*b*).

And that in such a case the consent of the king is not at all necessary, albeit he has an interest in the churches in the case of lapse. For by the ancient canon law the licence of the pope was not necessary; nor has the licence of the king been judged necessary since the Reformation; inasmuch as unions have been ordinarily made without such licence; however, in some few instances, it may have been desired and obtained for the greater caution (*c*). The point, however, seems to be one of

(*a*) *Gibs.* p. 920; *God.* p. 170.

(*b*) *Harman v. Renew*, 1 Salk. p. 164; *Hughes*, c. 28, p. 280; *Rex v. Abp. of Armagh*, 1 Stra. p. 516.

(*c*) *Austyn v. Twyne*, Cro. Eliz. p. 500; *Gibs.* pp. 916, 920; *Wats.* c. 16, pp. 179, 183.

some doubt (*d*); though not now (since 1 & 2 Vict. c. 106, s. 20) of much importance.

The old statutes enabling unions in certain cases, 37 Hen. 8, c. 21 (*e*), and 17 Car. 2, c. 3, are, as will be seen, now repealed. By the 4 Will. 3, c. 12, it was enacted, that where one of the churches united by virtue of the said last-mentioned act, was at the time of such union, or shall afterwards be demolished; in such case, as often as the church which is made the church presentative, and to which the union was made, shall be out of repair, or there shall be need of decent ornaments for the performance of divine service therein, the parishioners of the parish whose church shall then be down or demolished, shall bear and pay towards the charges of such repairs and decent ornaments, such share and proportion as the archbishop or bishop that shall make such union shall by the same union direct and appoint; and for want of such direction and appointment, then one third part of such charges of the repairs and decent ornaments which shall be made or provided; and the same shall be rated, taxed, and levied, and in default thereof such process and proceedings shall be made, as if it were for the reparation and finding decent ornaments for their own parish church, if no such union had been made.

But if both churches are standing, then the repairs and ornaments shall be provided for, as they were at the common law; that is, by the parishioners of each parish respectively (*f*).

Unions *in futuro*, as well as *in presenti*, were under the old law good. And therefore if two churches were full, and one was duly united to the other *in futuro*, when either became void, the surviving incumbent might enter upon the void living, without any other title than that which he received from the act of union (*g*).

Union may be
in futuro.

By the union of two churches, no change is made in the advowsons: that is, not only all rights are reserved to the patron or patrons, as before, but the nature of the advowsons continues the same; as, if one be appendant, and the other in gross, and that which is appendant is made the presentative church, and the patron of the church in gross has the first turn, yet shall not the whole advowson be in gross, but it shall remain appendant for his turn who was patron of the advowson appendant, and in gross for his turn who was patron of the advowson in gross. Which being so (that is, the advowsons, not only as to the right, but even as to the nature of them, remaining the same as before), it seems to be an unreasonable doubt, whether bishops and other ecclesiastical persons could

Presentation
to united
benefices.

(*d*) *Daniel v. Morton*, 16 Q. B. p. 494; Serjt. Hill's MSS.; and p. 198; 15 Jur. p. 699. *Wright v. Legge*, 6 Taun. p. 51.

(*e*) For authorities on the 37 Hen. 8, c. 21, see Gibs. pp. 916—920; *The Queen v. Page*, Cro. Eliz. p. 719; *Bp. of Lincoln and Whitehead v. Wolferstan*, 1 Black. W.,

(*f*) Gibs. p. 919.

(*g*) Gibs. p. 920. This must all now be read with the recollection that compulsory church rates are in the ordinary case now abolished.

consent to an union after the statutes 1 Eliz. c. 19, and 13 Eliz. c. 10 (*h*).

How title of
patron after
union pleaded
and conveyed.

In *Robinson v. The Marquis of Bristol* (*i*), it was holden by the Exchequer Chamber, reversing the judgment of the Common Pleas, that where two benefices are united, the patronage of the united benefice vesting in the former patrons alternately, it is right in pleading to describe the title of one of the patrons as to a moiety of the advowson of the united benefice, and in conveying to convey the advowson of the former ununited benefice, because the conveyance of this latter carries with it the right to the former. Where three parish churches had been united by the local act 22 Car. 2, c. 11, it was held that the benefice might be described, in pleading, as one rectory (*k*).

Reparations.

Two churches parochial being united at the common law, the reparations remained several as before. Which was the reason why the aforesaid act 4 Will. 3, c. 12, was found necessary to make it otherwise in the churches that had been or should be united in virtue of the statute of 17 Car. 2, c. 3. For before that, the inhabitants, even of a demolished church, were not obliged to contribute to the reparations of the church remaining, to which they were united (*l*).

Other
payments
and duties.

The payment of first fruits and tenths, as before, were specially reserved in the aforesaid statutes: and the same, together with all other payments and duties to the bishop, archdeacon, and the like, and even the fees of institution, were under the old law reserved, of course, in perpetual unions, whether within the said statutes or not (*m*).

Effect of
union as to
pluralities.

By the union the two churches are become so much one, that a second benefice may be taken by dispensation within the statutes of pluralities (*n*).

Church united
to a prebend.

If a church parochial be united to a prebend in a cathedral church, and a clerk is collated to the prebend, and after installed in the cathedral, although that the parish church be not in the same diocese with the cathedral, yet the clerk thereby has possession thereof, without any presentation, institution, or induction; because by the union the parish church is become the corps of the prebend (*o*).

Union, how
tried.

After an union was made under the old law, if any question arose concerning the validity thereof; this might not be tried in the temporal, but only in the spiritual court: unless it were such union as is restrained by the aforesaid statutes (*p*).

Union not
presumed.

In *The Attorney-General v. The Hospital of St. Cross* (*q*), the court refused to presume from the circumstances the union of two

(*h*) Gibs. p. 920; Wats. c. 16, p. 185.

(*i*) 11 C. B. pp. 208, 241; 15 Jur. p. 926; 16 Jur. p. 889.

(*k*) *Wilson v. Var Mildert*, 2 B. & P. p. 394.

(*l*) Gibs. p. 921.

(*m*) Gibs. p. 917.

(*n*) *The Queen v. Page*, Cro. Eliz. p. 720; Gibs. p. 920.

(*o*) Wats. c. 16, p. 186.

(*p*) Ibid.

(*q*) 8 De G. M. & G. p. 38; 2 Jur. N. S. p. 336; 25 L. J., Ch. p. 202.

benefices. In that case it was said that there was no precedent or principle which would authorize the union of the mastership of a hospital with a rectory.

In *Daniel v. Morton* (*r*), a temporary union of two benefices by the bishop during the incumbency only of the particular clerk, conditioned on the clerk keeping a sufficient curate for the benefice on which he did not reside, was held not to operate as an union, but, if at all, as a dispensation of pluralities; so that the clerk was non-resident under 1 & 2 Vict. c. 106, as to the benefice on which he did not actually reside.

A temporary union held no union.

The law as to the union of benefices has undergone a complete alteration by virtue of several modern statutes.

By 1 & 2 Vict. c. 106, s. 15, the acts 37 Hen. 8, c. 21, and 17 Car. 2, c. 3, for uniting churches, are repealed; and the following new enactments are made:

1 & 2 Vict. c. 106.

Sect. 16. "Whenever it shall appear to the archbishop of the province, with respect to his own diocese, and whenever it shall be represented to him by the bishop of any diocese, or by the bishops of any two dioceses, that two or more benefices, or that one or more benefice or benefices, and one or more spiritual sinecure rectory or rectories, vicarage or vicarages, in his or their diocese or dioceses, being either in the same parish or contiguous to each other, and of which the aggregate population shall not exceed one thousand five hundred persons (*s*), may with advantage to the interests of religion be united into one benefice, the said archbishop of the province shall inquire into the circumstances of the case; and if on such inquiry it shall appear to him that such union may be usefully made, and will not be of inconvenient extent, and that the patron or patrons of the said benefices, sinecure rectory or rectories, vicarage or vicarages respectively, is or are consenting thereto, such consent being signified in writing under the hands of such patron or patrons, the said archbishop shall, six weeks before certifying such inquiry and consent to her Majesty as hereinafter directed, cause, with respect to his own diocese, a statement in writing of the facts, and in other cases a copy in writing of the aforesaid representation, to be affixed on or near the principal outer door of the church, or in some public and conspicuous place in each of such benefices, sinecure rectories, or vicarages, with notice to any person or persons interested that he, she, or they may, within such six weeks, show cause in writing under his, her, or their hand or hands to the said archbishop against such union, and if no sufficient cause be shown within such time, the said archbishop shall certify the inquiry and consent aforesaid to her Majesty in council, and thereupon it shall be lawful for her Majesty in council to make and issue an order or orders for

Provisions of old acts re-enacted and extended.

(*r*) 16 Q. B. p. 198; 15 Jur. p. 699. followed here are repealed by 13 & 14 Vict. c. 98, s. 87, and 37 & 38 Vict. c. 96.

(*s*) The words that originally

uniting such benefices, sinecure rectory or rectories, vicarage or vicarages, into one benefice, with cure of souls, for ecclesiastical purposes only ; and it shall be lawful for her Majesty in council to give directions for regulating the course and succession in which the patrons, if there be more than one patron, shall present or nominate to such united benefice from time to time as the same shall become vacant, and for determining, if such united benefice shall be in two dioceses, to which of such dioceses such benefice shall belong ; and such order or orders shall be registered in the registry or registries of the diocese or respective dioceses to which such united benefice shall be determined to belong, and to which either or any of the united benefices, sinecure rectories, or vicarages shall have belonged when separate, which order or orders the registrar or registrars of such diocese or respective dioceses, immediately on the receipt thereof, are hereby required to register accordingly ; and such order or orders shall thenceforth be binding on all parties whatsoever ; and if at the time of the registration of such order or orders all the benefices, sinecure rectories, or vicarages ordered to be united shall not be holden by the same incumbent, then if any of such benefices, sinecure rectories, or vicarages shall at such time be vacant, and if not, then upon every avoidance, until all the said benefices, sinecure rectories, or vicarages but one shall come to be holden by the same incumbent, the patron of the vacant benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, shall be bound to present or nominate, and the bishop shall be bound to admit and institute or licence, to the vacant benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, the incumbent of the other or one of the other benefices, sinecure rectory or rectories, vicarage or vicarages so ordered to be united ; and if both or all, as the case may be, shall be holden by the same incumbent at the time of the registration of such order or orders, or all but one of the said benefices, sinecure rectories, or vicarages shall at such time be vacant, then immediately, or otherwise on the first avoidance of either or any of such benefices, sinecure rectories, or vicarages, after all but one shall have come to be holden by the same incumbent, the said benefices, sinecure rectory or rectories, vicarage or vicarages shall become permanently united together, and shall be and be deemed and taken to be one benefice, with cure of souls, to all intents and purposes, unless and until the same shall be afterwards disunited in the manner hereinafter enacted : Provided always, that notwithstanding any such union the parishes or places of which such united benefice shall consist shall continue distinct as to all secular rates, taxes, charges, duties, and privileges, and in all other respects except as hereinbefore specified."

Sect. 17. "When it shall further appear to the archbishop of the province, with respect to his own diocese, or it shall be further represented to him by the bishop of any other diocese,

Glebe lands,
&c. may in
certain cases
be excepted

that the total income of any benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, proposed to be united as aforesaid, would be larger than sufficient for the due maintenance and support of the incumbent of the benefice when united, and that the whole or some specified part or parts of the glebe lands, tithes, rentcharges, tenements, and hereditaments belonging to the benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, proposed to be united, or any of them, might and could, with advantage to the interests of religion, be excepted out of such union, and be exchanged for certain other lands, tithes, tenements, and hereditaments, or any of them, in some other specified benefice situate in the same diocese, and having no competent provision belonging thereto, and that the lands, tithes, tenements, or hereditaments proposed to be given in exchange for such excepted lands, tithes, rentcharges, tenements, or hereditaments might with like advantage be granted, conveyed, and assured as a further perpetual endowment for the incumbent of such last-mentioned benefice, and that the patron or patrons of the said benefice or benefices, sinecure rectory or rectories, vicarage or vicarages respectively, and the incumbent or incumbents for the time being thereof respectively, or of such thereof as shall not be then vacant, and the owner or owners, impropiator or impropiators, of such lands, tithes, tenements, or hereditaments respectively so proposed to be given in exchange is or are consenting thereto, such consent to be signified in writing under their respective hands, it shall be lawful for the said archbishop, after inquiring into such further matter, to certify in like manner as aforesaid such further circumstances to her Majesty in council, and thereupon it shall be lawful for her Majesty, in and by such order as aforesaid, or any other order or orders, to direct that such first-mentioned lands, tithes, rentcharges, tenements, and hereditaments shall be excepted out of such united benefice, and be granted, conveyed and assured unto such owner or owners, impropiator or impropiators as aforesaid, in exchange for an equal value of lands, tithes, tenements, or other hereditaments situate or arising within the limits of such benefice, to be by such owner or owners, impropiator or impropiators, granted, conveyed, and assured for the further endowment of such other benefice; and such order or orders shall be registered in the register of the diocese to which such united benefice and other benefice shall belong, and which order or orders the registrar of such diocese, immediately on the receipt thereof, is hereby required to register accordingly, and such order or orders shall thenceforth be binding on all parties whatsoever; and such lands, tithes, tenements, and hereditaments, so directed to be granted, conveyed, and assured to such owner or owners, impropiator or impropiators, as aforesaid, shall, immediately upon and after the execution and inrolment in manner hereinafter directed of the deed or deeds, instrument

out of any united benefice to augment the provision for any other adjoining poor benefice by an exchange in such manner that the augmentation shall be situate within the limits of such other benefice.

or instruments hereinafter mentioned, be for ever freed and discharged of and from all estate, right, title, and interest whatsoever of all and every the incumbent or incumbents for the time being of the said benefices, sinecure rectory or rectories, vicarage or vicarages so to be united, and become and be subject and liable in every respect to all and singular the uses, trusts, estates, and charges of or to which the lands, tithes, rentcharges, tenements, or other hereditaments so granted, conveyed, or assured by such owner or owners, impropiator or impropiators, for such further endowment as aforesaid, may at the time of such execution have been subject or liable; and that such last-mentioned lands, tithes, rentcharges, tenements or other hereditaments, so granted, conveyed, and assured by such owner or owners, impropiator or impropiators, for such further endowment as aforesaid, shall in like manner become and be for ever annexed to such other benefice for the further endowment of which the same shall be so granted, conveyed, and assured, and be held and enjoyed for ever by the incumbent for the time being thereof, as part of the endowment thereof, freed and discharged of and from all uses, trusts, estates, and charges whatsoever to which the same respectively or any part thereof were or was before subject or liable."

Such conveyances in exchange to be by deed in writing under the hands and seals of all parties interested, to be inrolled in chancery.

Sect. 18. "All such grants, conveyances, and assurances as aforesaid shall be made by a deed or deeds, instrument or instruments, in writing, under the hand and seal or hands and seals of the patron or patrons of the benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, affected thereby, and of the owner or owners, impropiator or impropiators of the lands, tithes, tenements, and hereditaments, so to be given in exchange as aforesaid; and the bishop of the diocese for the time being shall testify his approval thereof by being a party and affixing his episcopal seal thereto; and the incumbent or incumbents for the time being of such of the said benefice or benefices, sinecure rectory or rectories, vicarage or vicarages, as shall not be then vacant, shall testify his or their approval by being a party or parties to and signing the same respectively, and shall be the party or parties by whom the grant, conveyance, and assurance to be made or executed to such owner or owners, impropiator or impropiators as aforesaid, shall be made and executed."

Such deeds or instruments in writing, are by the same section to be inrolled in the High Court of Justice "within six calendar months after the execution thereof respectively, or else have no operation under the act."

Approval of bishop of the diocese.

Sect. 19. "The approval of the said bishop, testified as aforesaid, shall be conclusive that the lands, tithes, rentcharges, tenements, and hereditaments so to be granted, conveyed, and assured under or by virtue of the provisions aforesaid were respectively of the proper value required by this act, and were respectively granted, conveyed, and assured in due accordance with the provisions aforesaid."

Sect. 20. "From and after the passing of this act it shall not be lawful to unite two or more benefices into one benefice in any other form or manner or under any other circumstances than is hereinbefore provided; and that if any such union shall be made in any other form or manner or under any other circumstances than as it is hereinbefore provided, the same shall be void to all intents and purposes whatsoever, any statute, law, canon, custom, or usage to the contrary notwithstanding."

No union except under this act.

By 13 & 14 Vict. c. 98, s. 8, a provision in 1 & 2 Vict. c. 106, s. 16, that "the aggregate yearly value shall not exceed five hundred pounds" was repealed; but it was provided "that it shall be lawful for the bishop to direct that there shall be two full services in each church of such consolidated livings."

Union may be made, notwithstanding the aggregate yearly value exceeds 500*l*.

4 & 5 Vict. c. 39, s. 23, enables the ecclesiastical commissioners, with the consent of the patrons, and of the bishop of the diocese where one of the patrons is an ecclesiastical corporation, to make exchanges of advowsons through the instrumentality of the archbishop and the Queen in council, in order to facilitate unions of benefices under 1 & 2 Vict. c. 106.

4 & 5 Vict. c. 39. Exchanges to facilitate unions.

In 1855 a temporary act, 18 & 19 Vict. c. 127, was passed, to last for five years only, for facilitating the union of benefices in the metropolis. Proceedings under this act pending at the time of its expiry were confirmed and allowed to continue by 23 & 24 Vict. c. 142, s. 30. Otherwise its only present importance is on account of the unions that were actually made under it.

18 & 19 Vict. c. 127.

Its provisions enabled contiguous benefices to be united, whatever might be the aggregate population and aggregate yearly value (sect. 1). The inhabitants in vestry assembled were to petition the bishop; the bishop, if satisfied that an union was desirable, and if the patrons consented, was to certify accordingly to the church building commissioners (*t*), who were to propose a scheme for the union, to be ratified by the Queen in council (sect. 2). The commissioners might insert in the scheme a provision applying the surplus revenues for the benefit of other parishes (sect. 3). Notice of the proposed scheme was to be given, protests against it were to be heard by the judicial committee of the privy council, and the scheme, when finally approved by the Queen in council and gazetted, was to have the force of law (sects. 4—7). The commissioners might propose to erect a new church and parsonage, and to remove, pull down, and sell the old one and the site, but no burial ground or vault was to be sold (sects. 8, 9, 14). The church and vestry left standing are to be the church and vestry of the united parishes for all purposes (sect. 10). The Bishop of London might appropriate one church, which was otherwise to be pulled down, for services in Welsh (sect. 11). Schemes were to be made for transferring endowed lectureships in churches pulled down to other churches (sect. 12). Pews were to be readjusted and

(*t*) Afterwards the ecclesiastical commissioners.

appropriated for the united benefice ; but no less than one-third of the sittings are to be free and unappropriated (sect. 13).

34 & 35 Vict.
c. 90.

The following are the provisions which have been made by 34 & 35 Vict. c. 90, "The Union of Benefices Acts Amendment Act":—

One church to
be the parish
church of an
united or
separate
benefice.

Sect. 3. "Where two or more benefices are united, or two or more portions of the same benefice, or of different benefices, are constituted a separate benefice, and held by one incumbent, and there are more churches than one situate within the limits of such united or separate benefice, it shall be lawful for the bishop of the diocese, upon the application and with the consent in writing of the incumbent and patron or patrons of the benefice, and with the consent of two-thirds of the parishioners within the limits of such united or separate benefice in vestry assembled, by a faculty from his consistorial court, to decree that one of such churches shall henceforth be constituted the parish church of such united or separate benefice, and that any other church or churches within the limits of such united or separate benefice may be either wholly or partly pulled down or suffered to remain standing or still be used for the purposes of divine service, either as a chapel or chapels of ease to the parish church or otherwise, or be converted into a mortuary chapel or mortuary chapels ; and the vestry room of the church so constituted the parish church shall be held to be the vestry room of the parishes or places constituting such united or separate benefice for the use of the parishioners thereof ; provided, that the said bishop shall not make any such decree for the pulling down either the whole or part of any such church or churches until a sum sufficient to defray the expenses of the transfer as hereinafter prescribed of the tombstones, monuments, tablets, and monumental inscriptions in the church so to be wholly or partly pulled down has been collected by voluntary subscriptions, and placed in the hands of two or more trustees to be applied to such purpose."

Site of disused
church to be
preserved.
Burials.

Sect. 4. "The site of any church which shall be wholly or partly pulled down, and the churchyard belonging thereto, shall be properly fenced in and preserved and kept free from desecration, and until such churchyard shall be legally closed for interments the persons for the time being having rights of burial in such churchyard shall not be entitled to rights of burial in any other churchyard within the limits of the same united or separate benefice: Provided always, that nothing in this act contained shall apply to any proceedings for the union of benefices taken under the provisions of 23 & 24 Vict. c. 142" (*u*).

Tombstones,
font, altar,
&c. to be
transferred
from disused
church to
parish church.

Sect. 5. "The tombstones, monuments, tablets, and monumental inscriptions in any church so wholly pulled down, or in such part of any church as is pulled down, shall be transferred to the parish church of such united or separate benefice, or in

(*u*) Vide *infra*, p. 405.

the case where the removal is from such part of a church as has been pulled down, to the part of a church which is suffered to remain standing; and the font, communion table, and plate used for the purposes of the holy communion belonging to or held in trust for any church so wholly pulled down shall be transferred to such parish church; and all lectureships attached to any church so wholly pulled down or disused for the purposes of divine service shall be transferred to the parish church of such united or separate benefice; and all sums of money or other property held by any body or person or persons in trust for the maintenance, repair, or insurance of any church which shall cease to be used for the purposes of divine service or for a mortuary chapel under the provisions of this act shall thereupon be held upon the like trusts for such parish church.”

Repair fund,
&c.

Sect. 6. “When any church shall have been so constituted a parish church the persons residing within the limits of the said united or separate benefice shall, subject as in this act mentioned, have the same rights, be entitled to the same privileges, and be subject to the same obligations in relation to such church as if the same church had always existed as such parish church.”

Rights of
parishioners.

Sect. 7. “Upon any union of benefices the bishop of the diocese, under his hand and seal, shall and he is hereby authorized by faculty from his court to alter and readjust the seats and the appropriation thereof in the church of the united or separate benefice, so that not less than one-half of the sittings in such church shall be left unappropriated; and all the seats whether appropriated or free under any new arrangement made under this provision shall be made as near as possible of the same size and general appearance.”

Bishop to
direct the
arrangement
of the church
seats, which
shall be of
an uniform
pattern.

By sect. 2, this act is to be read and construed as one with 1 & 2 Vict. c. 106, and 13 & 14 Vict. c. 98.

A further special enactment (23 & 24 Vict. c. 142) has been made as to the union of benefices within the metropolis.

23 & 24 Vict.
c. 142.

The following are the provisions of that act:—

Unions in
the metro-
polis.

Sect. 1. “Two or more contiguous benefices within the metropolis as defined by 18 & 19 Vict. c. 120, intituled ‘An Act for the better Local Management of the Metropolis’ (x), may from time to time be united, or a benefice or contiguous benefices and one or more spiritual sinecure rectory or rectories, vicarage or vicarages, contiguous to such benefice or benefices, and situate in the metropolis, may from time to time be united, without regard in any case to aggregate population or aggregate yearly value, and without limitation as to the same, and every such union shall be effected in the manner hereinafter provided.”

Contiguous
benefices
within the
metropolis, as
defined by
18 & 19 Vict.
c. 120, may
be united.

Sect. 3. “Whenever it shall appear to the bishop of the diocese of London or of Winchester, as the case may be, that an union of benefices may with advantage to the interests of religion

Power to
Bishops of
London or
Winchester

(x) See sect. 250, and schedules A, B and C to that act.

to issue
commissions.

be effected within his diocese, he may cause a commission to be issued under his hand and seal, addressed to five persons, to be nominated as after mentioned, authorizing and requiring them to inquire into and report upon the expediency of the proposed union, and such commissioners shall and may inquire into all such matters in anywise affecting such union or connected therewith as they may deem necessary, and the commissioners shall make their return to the commission within six calendar months from the issuing of the commission, or within such enlarged time as the bishop shall, by writing under his hand from time to time direct, and notice of the issuing of a commission shall be sent by the bishop to the vestry clerk of each parish proposed to be united, and notice thereof shall be published by such vestry clerk by affixing it upon the door of the parish church."

Commission,
how to be
nominated.

Sect. 4. "Three of the commissioners shall be beneficed clergymen residing within the diocese, of whom one shall be nominated by the dean and chapter of the cathedral church of Saint Paul (y), and two by the bishop of the diocese, and the remaining two shall be lay members of the church of England, and shall be nominated to the bishop by the corporation of the city of London (z); and no commissioner shall be entitled to claim or shall receive any salary or payment for performing the duties imposed on him as such commissioner."

The number
to constitute
a quorum,
their powers,
and the re-
turn to the
commission.

Sect. 5. "Three of the commissioners, of whom one shall be a lay commissioner, shall constitute a quorum; and the commissioners shall have power at their discretion to call for the production before them of any documents not affecting private interests which they may deem necessary for the purposes of the commission, and the persons having the care or custody of such documents shall be bound to produce them to the commissioners upon the requisition in writing of any two commissioners; and the commissioners may examine on oath all persons desirous or willing to be examined by them touching any matter relating to the object of the commission, and may administer the oaths necessary for that purpose, and the churchwardens of the parishes proposed to be united shall have notice of the sittings of such commission, and shall be entitled, with their vestry clerk, to attend thereat; and the commissioners shall in their return to the commission certify all such matters and things as shall appear to them material, together with their opinion as to the expediency or otherwise of the proposed union, and if they, or any three of them competent to constitute a quorum, shall deem the union expedient, shall recommend the terms on which in their opinion the same ought to be effected."

(y) By the dean and chapter of Westminster, if the proposed union is within the city of Westminster (s. 32).

(z) By the vestries of the parishes affected, if the proposed union is not within the city of London or the liberties thereof (s. 32).

Sect. 6. "If before the return to the commission any commissioner shall die, or become incapable of acting by removal from the diocese or otherwise, the commission shall continue in full force, unless there shall not be sufficient commissioners remaining to constitute a quorum; and notwithstanding the death or disqualification of any one or more of the commissioners the qualified commissioners for the time being shall continue to exercise the powers given to the commissioners by this act until such vacancy or vacancies shall have been filled up; but if there shall not be a sufficient quorum the bishop may, either before or after the time limited for the return to the commission, issue a fresh commission under the provisions of this act in lieu of the original commission, and the commissioners under such substituted commission shall have all the powers of the original commission, and may adopt the evidence taken under it."

Disqualification of commissioners, and the issuing a fresh commission.

Sect. 7. "If the return to the commission shall recommend an union, the bishop shall cause proposals for a scheme, based upon the terms recommended, to be prepared for effecting the union; which proposals, with the consent thereto in writing of the patron or patrons of each of the benefices affected, shall be transmitted by the bishop to the churchwardens of each parish proposed to be united, in order that the same may be considered by the inhabitants in vestry assembled; and all such proposals shall have especial regard to the residence of the incumbent on the benefice proposed to be constituted the united benefice, and shall contain all necessary provisions conducing to such residence."

Bishop to prepare and transmit proposals for a scheme to churchwardens and vestry.

Sect. 8. "The vestry of each parish shall, by the vestry clerk or other officer, notify to the bishop, within two calendar months after the receipt of the proposals, their assent or their objections to or any suggestions for the modification of the same, and the bishop shall give full consideration to every such notification of vestry, and shall make such alterations in the proposals as he may think right; and the bishop shall cause such proposals, as finally approved by him, and assented to by the patrons and by the vestries of the parishes to be affected thereby, to be transmitted to the Ecclesiastical Commissioners for England, who shall thereupon cause to be prepared a scheme for carrying out the proposed union, which scheme may, with the assent of the bishop and patrons, and the vestries of the parishes to be affected thereby, embody any modifications of the proposals, and shall send drafts of such proposed scheme to the churchwardens of the parishes to be respectively affected by the scheme with notice that they or any of them may, within two calendar months, show cause to the Ecclesiastical Commissioners against the proposed union or any part or parts of the scheme relating thereto; and if within such period of two calendar months no cause be shown, the Ecclesiastical Commissioners shall certify the scheme, and the consent thereto in writing of the bishop and of

Vestry to notify assent or objections, and bishop to transmit final proposals to ecclesiastical commissioners, to prepare scheme, and certify same to the Queen in council.

the patron, and of the vestries of the parishes to be affected thereby, to Her Majesty in Council, and thereupon it shall be lawful for Her Majesty in Council to make and issue any Order or Orders for effecting the union and for uniting the parishes of the united benefices into one parish for ecclesiastical purposes, and for such other purposes as are herein provided: Provided always, that if any petition or statement is lodged by way of protest, or any appeal is made against the scheme or any part thereof, as hereinafter is provided, no such Order or Orders in Council shall be made or issued until such petition or statement has been duly considered, or the parties to such appeal have been duly heard."

What the commissioners shall insert in the scheme.

Sect. 9. "It shall be lawful for the Ecclesiastical Commissioners to insert in any scheme to be prepared by them all proper directions for the appointment of the first incumbent of the united benefice, and for regulating the course and succession in which the patrons, if there be more than one patron, shall present or nominate to such united benefice from time to time as the same shall become vacant; and they shall have power to insert in any scheme all such provisions in addition to those hereby expressly authorized as may in their opinion be necessary for effectually carrying out the particular measures proposed by the scheme, including any provisions which may be found necessary for the compensation of any of the incumbents of the benefices to be united who may be willing to retire therefrom (a); and the Ecclesiastical Commissioners shall and may, for the purposes of this act, exercise all powers and privileges now or for the time being exercisable by them under the acts of parliament relating to their commission, or under the Church Building Acts, particularly as regards the purchase of sites and the erection of churches."

Part of a benefice or united benefice may be severed and included in scheme.

Sect. 10. "Whenever it shall be deemed expedient to unite part only of a benefice with some other contiguous benefice or benefices, any portion of a benefice or benefices, or any portion of two or more benefices, which shall have been united under the provisions of this or of any other act, or in any other manner, and either prior to or subsequently to the passing of this act, may in the manner prescribed by this act be severed from the remaining portion; and thereupon such a portion of the parish or united parishes to which the benefice shall belong as shall be determined by the scheme effecting the severance shall become disunited for ecclesiastical purposes; and the portion of benefice and parish so severed shall, for the purposes of an union of benefices under this act, be deemed to be a separate benefice and parish respectively, and may by the same scheme and Order in Council under which such severance shall be effected, or by any supplemental scheme, be united to any other contiguous benefice or benefices; and in such original or

(a) See *McBean v. Deane*, 30 Ch. D. p. 520.

supplemental scheme provisions may be inserted for annexing to the severed portion a proportion of the real and personal property of the parish or united parishes from which such severance shall have been made, and for the dealing with and application of the property (if any) to be so annexed, and for defining and determining the rights of the parishioners of the severed portion in regard to the joint vestry of the newly united parish with which the severed portion shall be incorporated, and as to the manner of exercising such rights, and all such other provisions as may seem to the Ecclesiastical Commissioners necessary or expedient in lieu of any provisions contained in this act not applicable to an united benefice or parish of which a severed portion of a benefice or parish shall constitute part; and after the severance the remaining portion of the benefice or parish from which the severance shall have been made shall continue one benefice or parish or united benefice or parish, and shall not be otherwise affected by such severance; and whenever in this act the consent of the patron of a benefice shall be required for carrying the same into effect, the patron whose consent shall be requisite in the case of any such severed portion shall be the patron of the benefice or united benefice from which such severance shall be intended."

Sect. 11. "Whenever it shall appear to the Ecclesiastical Commissioners that the total revenue of any benefices proposed to be united would be more than sufficient for the due maintenance and support of the incumbent of the benefice proposed to be constituted an united benefice, and of such assistant curate or curates as may be needed for the same, and that some specified part or parts of the permanent endowments belonging to the benefices proposed to be united, or any of them, might with advantage to the interests of religion be made subject to a certain annual rentcharge in perpetuity in favour of some other specified benefice in the Metropolis or in the vicinity thereof, or might be excepted out of such union, and transferred and annexed to such other specified benefice, having no provision or no competent provision belonging thereto, as an endowment or a further endowment for the same, the Ecclesiastical Commissioners, with the consent of the patron or patrons of the benefices proposed to be united, and of the vestries of the parishes to be affected thereby, and of the bishop of the diocese within which such benefices shall be situate, may prepare and submit to Her Majesty in Council a scheme for providing such rentcharge, or for effecting such transfer or annexation, and thereupon it shall be lawful for Her Majesty in Council to make and issue an Order or Orders for giving effect to the said scheme of the Commissioners, and in the scheme there shall be inserted all such powers for recovering the rentcharge (if any) by distress upon or perception of the rents and profits of the hereditaments to be charged therewith or otherwise, and for the immediate or prospective apportionment of such rentcharge or otherwise in

Surplus revenue of united benefice may be annexed as an endowment to any other benefice in the metropolis or its vicinity.

relation thereto, as to the Ecclesiastical Commissioners shall seem reasonable and proper; and upon the Order or Orders directing such provision, transfer, or annexation coming into operation the rentcharge or other permanent endowments to be provided, transferred, or annexed shall, without any further deed, transfer, or other assurance, become and be for ever annexed to such benefice, and the same, and all powers for recovering the rentcharge (if any) or relating thereto, shall be vested in and held and enjoyed and be exercisable by the incumbent thereof for the time being as the endowment or a part of the endowment thereof, subject and without prejudice nevertheless to all leases, grants, rents, charges, and incumbrances existing at the time of such provision, transfer, and annexation legally affecting the same; but the Ecclesiastical Commissioners may, in their discretion, appropriate any part not exceeding one equal fifth part of the annual income arising from any such endowment during the whole or any part of the first five years next after the scheme shall come into operation as a fund in augmentation of the fund hereinafter provided for the payment of the costs, charges and expenses of carrying the provisions of this act into effect: Provided that the amount of such rentcharge leviable under such scheme in any parish proposed to be united, and not included in 22 Car. 2, c. 11, shall not exceed the average annual amount levied and paid to the incumbent of such parish in the seven years immediately preceding the passing of this act."

By sect. 12, the patronage of benefices may be exchanged, for facilitating unions.

Scheme may provide for erection of new church or parsonage, removal of old church or parsonage, sale of site, &c.

Sect. 14. "Any scheme may (but subject to objection and protest as after mentioned, and subject to the restrictions herein contained,) provide for the erection of any new church or parsonage house, for the pulling down or removal of any existing church, except as hereinafter provided, or parsonage house of any benefices proposed to be united, and for the appropriation or sale of the materials and the site of the same respectively, and of the ground annexed thereto and necessary for the use and enjoyment thereof (*b*), for the appropriation of any plate or other furniture held in trust for any church to be pulled down, for the disposal of any organ in such church, for the transfer of any lectureships attached to such church, but not so as to affect the right of appointment to any lectureship, or for sale or exchange of any parsonage or glebe houses or buildings, or the sites thereof, with their appurtenances, for compensation to parish clerks or other officers, or for arrangement with respect to fees or vestry rooms; but the font, communion table, and plate used for the purposes of the holy communion shall not be sold, but shall be transferred to the church of the united benefice, or if such font, communion table, and plate be not needed for such church, then to any other church or chapel, or churches

(*b*) See *The Ecclesiastical Commissioners v. Kino*, 14 Ch. D. p. 213.

or chapels, within the diocese which the bishop may select: provided always, that nothing in this act contained shall authorize the pulling down the churches of St. Stephen's, Walbrook, St. Martin, Ludgate, St. Peter, Cornhill, and St. Swithin, Cannon Street; provided also, that the scheme for the removal of any church or parsonage shall provide for the erection of another church or parsonage within the limits of the Metropolis.

Sect. 16. "Any person interested who may have shown cause to the ecclesiastical commissioners against the proposed union of any benefices, or against subjecting the endowments or revenues thereof, or any part of them, to any rentcharge or transfer, or annexation, or against any part or parts of any scheme certified by them to Her Majesty in Council, may appeal to Her Majesty in Council against such scheme or any part thereof in the usual manner, or may, at his option, state in writing by way of protest his objections to such union or any part or parts thereof, and the Ecclesiastical Commissioners shall annex such written statement or protest to their certificate to the Queen in Council, and Her Majesty in Council may order and direct that such objections shall be considered by the Judicial Committee of the Privy Council; and the said Judicial Committee shall make report to her Majesty in Council thereupon, and may propose to her Majesty in Council to affirm, vary, or dismiss the scheme certified by the Commissioners, or to return the same to the said Commissioners for alteration or amendment, and Her Majesty in Council may affirm, vary, or dismiss the scheme accordingly, or return the same to the Commissioners to be reconsidered as to any parts thereof."

Judicial committee to consider protest against scheme.

By sect. 15, no scheme shall be submitted to the Queen in Council till it has been laid before the two houses of parliament for two months.

By sect. 13, the order in council affirming a scheme, when gazetted and registered in the diocesan registry shall have the force of law.

By sect. 23, the order in council cures all previous informalities.

Sect. 17: "Nothing in this act contained shall legalize the sale or letting or appropriation of the site of any church unless with the consents in writing of the archbishop of the province, the bishop of the diocese, the archdeacon, and the Secretary of State for the Home Department, and the site shall be dealt with subject to such directions and restrictions as to the removal of the remains of persons deposited under the church to be pulled down, and as to the not disturbing and finally closing such vaults or graves, as to such Secretary of State shall seem meet; but nothing in this act contained shall legalize the sale or letting of any churchyard or burial ground; and no sale or letting shall be made of the site of any church wherein any bodies are known to be interred until after the remains of the persons deposited under such church shall have been properly removed at the cost

Site of church pulled down not to be sold or let without certain consents.

of the Ecclesiastical Commissioners, to be paid out of the fund hereinafter provided, into some consecrated churchyard or burial ground, or to such portion of the vaults of the same church as may be separated and set apart for a burial place; and notice shall be given by the churchwardens, or one of them, to the heirs, executors or administrators of any persons interred in or under any such church, where they can be ascertained, of the intention to remove such remains; and a certificate in writing under the hand of one of the churchwardens of the united parish that such removal has been duly made, and that such notice has been given, or that such heirs, executors or administrators cannot be ascertained, shall be conclusive evidence of the provisions of this act in regard to such removal having been complied with; and as to any tablets or monuments in such church, the same, if not removed by the heirs, executors, administrators, relatives or friends of the person, or of some or one of the persons, to whose memory the same shall have been erected, shall, at the cost of the Ecclesiastical Commissioners, to be paid out of the fund hereinafter provided, be carefully removed and fixed in some convenient part of the church to be constituted the church of the united parishes; but every such removal of tablets or monuments may be made without the necessity of a faculty from the bishop's court, and shall be free from the payment of any fees to the incumbent of such church or to any officer of the same or of the parish thereof: Provided always, that it shall be lawful for the heirs, executors, administrators, relations or friends of any persons who shall be interred or deposited in or under any such church, or in any such first-mentioned churchyard or burial ground, under proper direction, to remove the remains of such persons, and also the tablets or monuments erected to their memory, to any place they may think proper; and the expenses of such removal, not exceeding ten pounds in each case, shall be paid by the Ecclesiastical Commissioners out of the said fund."

After union of benefices parishes to become united for ecclesiastical purposes, and scheme to determine which church to be parish church.

Sect. 18: "After an union of benefices, the parishes whereof the benefices shall be united shall become and continue united, but for ecclesiastical purposes only, and in case there shall be only one church left standing and remaining within such united parish, such church shall be the church of the united parish; but in case more than one church shall be left standing, then the scheme shall determine which of the churches so left standing shall be the church of the united parish; and the vestry room of the church so constituted the parish church shall be held to be the vestry room of the united parish for the use of the parishioners thereof, and also the vestry room for secular purposes for the parishioners of each of the parishes forming the united parish, and for the care and preservation of the deeds, muniments and records belonging to the same, unless otherwise provided by the scheme."

Churches left for special purposes.

By sect. 19 the bishop may allow any additional church left standing to be used for service in the Welsh or Irish or in any

foreign language, or for the purposes of a school or schools in connexion with the church.

By sect. 20 the estates, rates, rights, and liberties of parishes united shall remain distinct as before union, and each parish is to elect its own churchwardens, who are together to "be churchwardens of the church of the united parish," and "the vestries of the united parish shall together form one joint vestry for all ecclesiastical purposes." Each parish is also to elect its own parish officers, and provision is made for select vestries.

Civil incidents.

By sect. 21, the union is not to affect the charities of the separate parishes.

Sect. 22. "All expenses which shall be incurred by or under the sanction or direction and on behalf of any bishop or the Ecclesiastical Commissioners in promoting any union of benefices, and in otherwise carrying the provisions of this act into execution, and of the scheme under which any union shall be effected, including all preliminary expenses so incurred, shall be paid by the Ecclesiastical Commissioners, out of a fund to be provided by them, in manner following (that is to say): They shall on the first sale by them of property or materials in pursuance of any scheme and order under this act appropriate the whole or such portion as they may think sufficient of the produce of such sale as a fund, which shall be applied by them in payment of the expenses incurred and to be incurred in relation to all the proposals and schemes for the union of benefices; and the same fund shall from time to time be augmented by the said Commissioners from the produce of similar sales of property as there may be occasion; and out of the fund so to be created the said Commissioners shall defray all the expenses incurred in relation or incidental to any commission to be issued under this act having reference to any union or proposed union of benefices, and to all inquiries, proposals, and schemes which shall be made and prepared in consequence of any such commission (including all preliminary costs and expenses, whether incurred prior or subsequently to the creation of such fund), and whether such inquiries, proposals, and schemes shall result in an Order in Council or not, and after providing a sufficient fund for the payment of all such expenses, and after providing and appropriating a portion of such fund sufficient in the opinion of the Ecclesiastical Commissioners to meet the probable preliminary expenses of any future commission to be issued under this act, having reference to the union of benefices, the surplus of the moneys so set apart shall be applied by them, with the consent in writing of the bishop, for the benefit of any benefice or benefices in the Metropolis, to whose benefit the said commissioners may, with such consent, think fit to apply the same."

Providing fund for payment of expenses of carrying act into execution.

Sect. 24 makes provision for the manner in which the consents of patrons and vestries to schemes shall be signified.

Supplemental provisions.

By sect. 25 supplemental orders may at any time be made by the Queen in Council.

By sect. 29, all property to be sold under the act shall vest in the ecclesiastical commissioners, whose conveyance to the purchaser shall be effectual.

By sect. 30, the act shall not interfere with the powers given by the previous acts for uniting benefices.

Bishop may prepare a scheme as to lectures customarily preached in churches to be pulled down.

Sect. 26. "In the case of endowed lectureships, when the lectures have been customarily preached in a church which may be taken down, or which may cease to be a parish church under the provisions of this act, such lectures shall be preached in the church which shall have been or may be selected as the church of the parish of which the church may have been taken down, or the bishop of the diocese for the time being may, in order to avoid difficulties, prepare from time to time under his hand a scheme or schemes for transferring such lectures to other churches, to be preached therein at such times as to the said bishop may appear convenient, but not so as to affect the right of electing or nominating any lecturer, and such scheme shall be submitted by the said bishop to the charity commissioners under the 'Charitable Trusts Act, 1853' (c); and such scheme, if approved of by them, and by the vestries of the parishes affected thereby, or subject to such alterations therein as may appear to the said Commissioners advisable, and as shall be approved of by the said bishop, and by the vestries of the parishes affected thereby, and if assented to in writing by the incumbent of the church to which it may be proposed to transfer the lectures, shall be valid for effecting the purposes therein mentioned, and shall be registered in the registry of the diocese; but nothing in this act contained shall give the bishop any power to license a lecturer without the consent of the incumbent of the church in which such lecturer is to officiate."

Bishop of diocese may direct churches to be resealed, and seats to be apportioned for the accommodation of parishioners.

Sect. 27. "If any commissioners appointed under this act shall report that it is not expedient to carry any proposed union into effect, but that it would be expedient to afford improved accommodation in one or more of the churches referred to in such report for casual residents in the city or town, and others not being parishioners, the bishop of the diocese may, in any such case in which the funds for the alteration of the seats in the manner recommended in such report shall within two years from the date of such report be provided by local or public subscription, direct such church to be resealed accordingly; and in such reseating due provision shall be made for the appropriation of such number of seats as may be required for the accommodation of all parishioners attending divine worship in such church, and the churchwardens shall have power to alter from time to time the appropriation of such seats, and to appropriate to the use of parishioners such further number of seats as may be required by them, and all the seats both appropriated and free under any new arrangement made under this present provision

shall be made as near as possible of the same size and general appearance."

Sect. 28. "Upon any union of benefices the bishop of the diocese under his hand and seal shall and he is hereby authorized, by faculty from his court to alter and re-adjust the seats, and the appropriation thereof, in the church of the united parish, so that not less than one-half of the sittings in such church shall be left unappropriated, and the remainder shall be placed at the disposal of the churchwardens of such church, under the control and direction of the bishop, for the use of the parishioners of such united parish discharged from all prescriptive and other pre-existing rights; and the bishop of the diocese, either upon an union of benefices, or at any time, and from time to time afterwards, may cause the church of the united parish to be re-seated, and may adjust and appropriate or re-adjust and re-appropriate the sittings in the same church; and all monies expended and required for such purposes, and not provided by voluntary donation or in any other manner, shall be deemed expenses incurred by the bishop in carrying the provisions of this act into execution, and shall be defrayed accordingly."

Appropriation
of seats in
church of
united parish.



SECT. 2.—*The Union of several Benefices in one Church.*

As has been already said (*d*), it has sometimes happened that more than one clerk is beneficed, and has cure of souls in the same church and parish (*e*). Medieties.

Benefices of this nature are often called medieties. Provision for their union or extinction has been made by the two following statutes:— Their
extinction.

3 & 4 Vict. c. 113, s. 72: "With respect to any parish in which both the profits and the spiritual charge are divided between two or more incumbents, each having a mediety or portion of the benefice, a plan or plans may be framed by the bishop of the diocese, with the consent of the patron or patrons, and so as not to prejudice the interests of any existent incumbent, for constituting any of such portions separate benefices, or for consolidating two or more of such portions into one benefice to be held by one incumbent (*f*), or for making such other arrangements as he may judge likely to promote the efficient discharge of pastoral duties in such parishes." Such plan may be carried into effect by an order in council confirming a scheme of the ecclesiastical commissioners. But it is provided "that nothing herein contained shall restrain the bishop from doing any act or 3 & 4 Vict.
c. 113.
Benefices may
be divided or
consolidated,
with consent
of patrons.

(*d*) Vide supra, pp. 237, 268.

(*e*) See *Rex v. Abp. of Armagh*, 1 Stra., p. 516; 2 Ought. p. 318.

(*f*) See *Welch v. Bp. of Peterborough*, 15 Q. B. D. p. 432.

exercising any power which he may now lawfully do or exercise without the consent of the patron or without the aid of the ecclesiastical commissioners."

32 & 33 Vict.
c. 94.

The portions
of a benefice
held in
severalty may
be consoli-
dated into
one.

32 & 33 Vict. c. 94, s. 9: "In every case where the respective incumbents of two or more benefices held in severalty (whether each of such benefices belongs to the same patron or to different patrons) have or shall have by statute or by custom the right in virtue of their respective incumbencies to execute the office of an incumbent within one and the same church, and within no other church other than a chapel of ease, then the powers and provisions given by and contained in section 72 of 3 & 4 Vict. c. 113, with respect to the consolidation of two or more portions of a benefice divided as therein mentioned into one benefice to be held by one incumbent, shall, subject to the conditions therein expressed, be available for and shall apply to and may be used for effecting the consolidation of both or all of such benefices into one benefice to be held by one incumbent, and this notwithstanding that such benefice when so united may include the cure of souls within more than one parish: Provided always, that any plan or scheme for such consolidation to be framed under the provisions of the act last mentioned may contain a regulation that such consolidation shall not take effect until after the next avoidance of any one or more of such benefices to be specially named in such plan or scheme; and provided also, that nothing herein contained shall be held to create an union of the two or more parishes so as aforesaid to be included within such united benefice, but that each of such parishes shall remain for all purposes, civil and ecclesiastical, precisely in the same position as if no such union of benefices as aforesaid had taken place" (g).



SECT. 3.—*The Annexation of Districts to Benefices.*

1 & 2 Vict.
c. 106.

Provisions for
annexing
isolated places
to the con-
tiguous
parishes, or
making them
separate
benefices.

Provision for this purpose was originally made by the following section of 1 & 2 Vict. c. 106:—

Sect. 26. "And whereas in some instances tithings, hamlets, chapeltries, and other places or districts may be separated from the parishes or mother churches to which they belong with great advantage, and places altogether extra-parochial may in some instances with advantage be annexed to parishes or districts to which they are contiguous, or be constituted separate parishes for ecclesiastical purposes: Be it enacted, that when, with respect to his own diocese, it shall appear to the archbishop of the province, or when the bishop of any diocese shall represent

(g) The local act 47 & 48 Vict. c. clv. specially applies these pro-

visions to the consolidation of the "portions" of Tiverton.

to the said archbishop that any such tithing, hamlet, chapelry, place, or district within the diocese of such archbishop, or the diocese of such bishop, as the case may be, may be advantageously separated from any parish or mother church, and either be constituted a separate benefice by itself or be united to any other parish to which it may be more conveniently annexed, or to any other adjoining tithing, hamlet, chapelry, place, or district, parochial or extra-parochial, so as to form a separate parish or benefice, or that any extra-parochial place may with advantage be annexed to any parish to which it is contiguous, or be constituted a separate parish for ecclesiastical purposes; and the said archbishop or bishop shall draw up a scheme in writing (the scheme of such bishop to be transmitted to the said archbishop for his consideration), describing the mode in which it appears to him that the alteration may best be effected, and how the changes consequent on such alteration in respect to ecclesiastical jurisdiction, glebe lands, tithes, rentcharges, and other ecclesiastical dues, rates, and payments, and in respect to patronage and rights to pews, may be made with justice to all parties interested; and if the patron or patrons of the benefice or benefices to be affected by such alteration shall consent in writing under his or their hands to such scheme, or to such modification thereof as the said archbishop may approve, and the said archbishop shall, on full consideration and inquiry, be satisfied with any such scheme or modification thereof, and shall certify the same and such consent as aforesaid, by his report to Her Majesty in Council, it shall be lawful for Her Majesty in Council to make an Order for carrying such scheme, or modification thereof, as the case may be, into effect; and such Order, being registered in the registry of the diocese, which the registrar is hereby required to do, shall be forthwith binding on all persons whatsoever, including the incumbent or incumbents of the benefice or benefices to be affected thereby, if he or they shall have consented thereto in writing under his or their hands; but if such incumbent or incumbents shall not have so consented thereto the Order shall not come into operation until the next avoidance of the benefice by the incumbent objecting to the alteration or by the surviving incumbent objecting, if more than one shall object thereto; and in such case the order shall forthwith, after such avoidance, become binding on all persons whatsoever."

2 & 3 Vict. c. 49, sect. 6, after reciting the enactment just set forth and that it is expedient to extend it, enacts: "That any such scheme or modification may be drawn up according to the regulations and directions in such act contained, subject to the consent in writing of the patron or patrons of the benefice or benefices to be affected thereby, under his or their hands, notwithstanding the vacancy of such benefice or benefices; and it shall be lawful for her Majesty in council thereupon to make an order for carrying such scheme, or modification thereof, as

2 & 3 Vict.
c. 49.

The scheme or modification may be made according to the regulation of the recited act, subject to the consent of the patron,

notwithstanding vacancy of benefice. the case may be, into effect; and such Order, being registered in the registry of the diocese as directed by the said act, shall come into operation and shall be forthwith binding on all persons whatsoever, notwithstanding such vacancy or vacancies."

By sect. 7, the provisions contained in 1 & 2 Vict. c. 106, touching the parties who shall be considered patrons, and the manner in which their consent shall in certain cases be given, shall apply to the consent of the patrons hereinbefore last required to be given.

Further provisions.

By sect. 8, when a separate parish is thus constituted, it shall be a perpetual curacy with cure of souls, either immediately if the incumbents of the old parishes consent, or if they do not consent, then upon the avoidance of his benefice by the last incumbent objecting.

Sect 22 makes provisions for the manner in which the consent of the patron is to be testified.

32 & 33 Vict. c. 94.

By 32 & 33 Vict. c. 94, s. 11, a parish where there is no church or patron, is to be treated as extra-parochial, and the consent of the bishop is to be sufficient, saving the rights of the crown.

50 & 51 Vict. c. 68.

By 50 & 51 Vict. c. 68, s. 1,

"A scheme under section twenty-six of the Pluralities Act, 1838 (*h*), in relation to any part of a parish or extra-parochial place, may provide for the transfer therefor to a different diocese.

Extension of former provisions.

"Where after the passing of this act it is proposed by a scheme under section twenty-six of the Pluralities Act, 1838, that a part of a parish or an extra-parochial place in any diocese should be transferred to another diocese, such scheme may be consented to in writing by the bishop of the other diocese, and (if the two dioceses are not in the same province) may be approved by the archbishop of the province in which the said other diocese is situate; and upon such consent, or such consent and approval, being given, the scheme may be dealt with and brought into effect by Order in Council in manner provided by the said section, and such Order shall be registered in the registry of both dioceses.

"Any Order in Council made under the said section before the passing of this act which would have been valid if made after the passing of this act shall be deemed to have been validly made, and to have had full effect as from the date thereof.

"In this act the expression 'part of a parish' includes any such tithing, hamlet, chapelry, place, or district as is mentioned in the said section, and the word 'bishop' includes, as respects his own diocese, an archbishop."

23 & 24 Vict. c. 142.

Sect. 10 of 23 & 24 Vict. c. 142 makes provision for the severance of parts of benefices and their annexation to other benefices within the metropolis (*i*).

(*h*) *i.e.*, 1 & 2 Vict. c. 106.

(*i*) Page 408, *supra*.

SECT. 4.—*The Disunion of Benefices.*

The provisions for effecting this when necessary are contained in the following sections of 1 & 2 Vict. c. 106:—

Sect. 21: "And whereas from the increase of population, or from other circumstances, it may be expedient that two or more benefices which have been heretofore united or which may be hereafter united under the provisions of this act should be disunited: Be it enacted that when two or more benefices shall have been united or may be hereafter united into one benefice, and, with respect to his own diocese, it shall appear to the archbishop of the province, or the bishop of any diocese shall represent to the said archbishop of the province, that one or more of the benefices within his diocese of which such united benefice shall consist may be separated therefrom with advantage to the interests of religion, the said archbishop shall inquire into the circumstances of the case, and if on such inquiry it shall appear to him that such union may be usefully dissolved, so far as respects such benefice or benefices, he shall, six weeks at least before certifying such inquiry to her Majesty as hereinafter directed, cause with respect to his own diocese a statement in writing of the facts and in all other cases a copy in writing of the aforesaid representation to be affixed on or near the principal outer door of the church or in some public and conspicuous place in each of the benefices forming part of the united benefice, with notice to any person or persons interested that he, she, or they may within such six weeks show cause in writing under his, her, or their hands to the said archbishop against any such disunion; and if no sufficient cause be shown within such time the archbishop shall certify the inquiry and consent, when the patron's consent is necessary, to her Majesty in council, and thereupon it shall be lawful for her Majesty to issue an order for separating such last mentioned benefice or benefices from such united benefice, and for declaring the rights of patronage of the several patrons if there be more than one patron, and such order shall be registered in the registry of the diocese to which such united benefice shall belong, which order the registrar of such diocese, immediately on the receipt thereof, is hereby required to register accordingly; and thereupon immediately, if such united benefice shall be then vacant, otherwise on the first avoidance thereof, such union shall be *ipso facto* dissolved so far only as regards such benefice or benefices so proposed to be separated from such united benefice, but in all other respects shall remain in full force and effect, and thenceforward such last-mentioned benefice or benefices shall be and be deemed and taken to be a separate and distinct benefice or benefices to all intents and purposes whatever as if no such union had taken place, and the patron or patrons thereof shall and may according to the terms of such order present or nominate thereto

1 & 2 Vict.
c. 106.

Provisions
for partly
disuniting
united
benefices.

respectively, and so from time to time upon each and every avoidance of the same: Provided always, that no benefices which have been united for more than sixty years before the passing of this act shall be disunited without the consent in writing of the patron or patrons thereof."

Incumbent may resign one or more of disunited benefices, and patron may present.

Sect. 22. "In any case in which her Majesty in council shall have issued any such order as aforesaid for separating one or more benefices from such united benefice it shall be lawful for the incumbent thereof, if such united benefice shall be full at the time of issuing such order, to resign the benefice or benefices so proposed to be separated as aforesaid from such united benefice; and thereupon it shall be lawful for the respective patron or patrons of such last-mentioned benefice or benefices to present or nominate thereto, in the same manner as if such united benefice had been vacant at the time of issuing such order."

Portion of glebe, &c. may be assigned to each of the dissevered benefices;

Sect. 23. "Whenever two or more benefices which have at any time been united into one benefice shall be disunited and become separate benefices under the provisions of this act, whether the order for disunion shall extend to the whole number of benefices of which such united benefice consisted, or to one or more of such benefices only, it shall be lawful for her Majesty in council, on the recommendation of the archbishop of the province, with the consent of the patron or patrons of such benefices respectively (such consent to be signified in writing under the hands of such patron or patrons), to assign and attach such portion of the glebe lands, tithes, moduses, rentcharges, or other endowments or emoluments belonging to or arising or accruing within the limits of such united benefice to each of such benefices respectively, as to her Majesty in council shall seem fit, notwithstanding such proportion of glebe land, tithes, rentcharges, moduses, or other endowments or emoluments, or any part thereof, may not arise or accrue within the limits of the benefice to which the same shall be so assigned and attached as aforesaid, or may not have belonged thereto, and also to divide and apportion between such benefices all such charges and outgoings as before the disunion thereof were imposed upon the whole united benefice, and in the case of mortgages with the consent of the mortgagees in writing under their hands and seals."

and shall belong to the incumbent.

Sect. 24. "All such lands, tithes, rentcharges, moduses, or other endowments or emoluments, when so assigned and attached as aforesaid, shall belong to, and the same and the rents and profits thereof shall be recoverable by, the incumbent of the benefice to which the same shall have been so assigned and attached."

More than one house may be provided in disunited benefices.

Sect. 25. "Whereas, by 1 Viet. c. 23 (*k*), provision is made in certain cases for selling the residence house and appurtenances belonging to any benefice, together with a certain

(*k*) Vide *infra*, Part V., Chap. II.

portion of land contiguous thereto, and for applying the proceeds of such sale to the erection or purchase of some house, or the purchase of an orchard, garden or land for the residence and occupation of the incumbent of such benefice: And whereas it may happen that in the case of benefices disunited under the provisions of this act, or divided or separately endowed under the provisions of 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134 (*l*), the existing benefice house may be inconveniently situated for any one of such disunited parishes, or of the divisions of such divided benefices, or may be on too large and expensive a scale to be conveniently maintained by the incumbent of any such disunited or divided benefice: Be it enacted, that all the provisions of the said recited act 1 Vict. c. 23, relating to the sale of the house, gardens, orchards, appurtenances, or land attached to any benefice, and the application of the proceeds of such sale, shall be and be deemed applicable to the case of any benefice divided or separately endowed under the provisions of the said acts, 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, or either of them, and of any benefice disunited under the provisions of this act; and that the proceeds of such sale may be applied and disposed of by the governors of the bounty of Queen Anne in and towards the erection or purchase of such and so many houses, or in and towards the purchase of so many gardens or appurtenances, or of so much land as shall be required for the residence of an incumbent, within each of the parishes so disunited, or each of the divisions of the benefices so divided, in such proportions within each such benefice respectively as shall be approved by the archbishop of the province, with the consent of the patron and ordinary, and (if the benefice be full) of the incumbent of the benefice, such consents to be signified in writing under their respective hands, and shall be confirmed by her Majesty in council."

23 & 24 Vict. c. 142, the act for facilitating unions of benefices within the metropolis (*m*), sect. 30, applies to all benefices which shall have been united under the provisions of that act, the provisions contained in 1 & 2 Vict. c. 106, in relation to the disunion of united benefices.

23 & 24 Vict.
c. 142.

It only remains to mention the following section, which relates equally to unions, annexations and disunions under this act:—

General
provision.

Sect. 27. "And whereas the changes effected by virtue of the provisions aforesaid for uniting or disuniting benefices, and for altering the contents of parishes, may, when the orders for those purposes respectively come into operation, raise doubts and create disputes not foreseen at the time when such orders may have been made respecting ecclesiastical jurisdiction, glebe lands, tithes, rentcharges, and other ecclesiastical dues, rates and payments, patronage, right to pews, and the definition of local

Power of
adjusting dis-
putes arising
out of the
foregoing
alterations.

(*l*) Vide *infra*, Part IX., Chap. VI.

(*m*) See *supra*, pp. 405—415.

boundaries: Be it enacted, that it shall be lawful for her Majesty in council, at any time within five years after such orders respectively shall come into full operation, if occasion shall arise, to make a supplemental order for removing such doubts and settling such disputes; and every such supplemental order shall have the same force and effect as if it had formed part of the original order made under the provisions of this act: Provided always, that in every case in which the contents of parishes shall be so altered such alteration shall not in any way affect the secular rates, taxes, charges, duties, or privileges of such parishes, or of any part of them."

CHAPTER XV.

CURATES—STIPENDIARY.

THE following are the provisions relating to curates in the Canons of 1603; but, in considering their present force and efficacy, regard must be had to the statutes since passed, especially to 1 & 2 Vict. c. 106:—

Can. 46. "Every beneficed man, not allowed to be a preacher, shall procure sermons to be preached in his cure once in every month at the least, by preachers lawfully licensed, if his living, in the judgment of the ordinary, will be able to bear it. And upon every Sunday, when there shall not be a sermon preached in his cure, he or his curate shall read some one of the homilies prescribed, or to be prescribed by authority, to the intents aforesaid." Canons as to curates.

Can. 47. "Every beneficed man, licensed by the laws of this realm, upon urgent occasions of other service not to reside upon his benefice, shall cause his cure to be supplied by a curate that is a sufficient and licensed preacher, if the worth of the benefice will bear it. But whosoever hath two benefices, shall maintain a preacher licensed in the benefice where he doth not reside, except he preach himself at both of them usually."

Canon 48 has already been set out at length (a).

Stipendiary curates are also by Canons 36 and 37 of 1865 required to make the same declarations and subscriptions as priests about to be admitted to benefices (b).

The Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), has the following provisions respecting the oaths and declarations to be exacted from stipendiary curates on their appointment. 28 & 29 Vict. c. 122.

Sect. 3. "The following declaration is hereinafter referred to as 'The Stipendiary Curate's Declaration':—

"*I, A. B., incumbent of —, in the county of —, bonâ fide undertake to pay to C. D., of —, in the county of —, the annual sum of — pounds, as a stipend for his services as curate; and I, C. D., bonâ fide intend to receive the whole of the said stipend.*" Declarations of stipendiary curates.
Stipendiary curate's declaration.

"*And each of us, the said A. B. and C. D., declare that no abatement is to be made out of the said stipend in respect of rent or consideration for the use of the glebe house; and that I, A. B., undertake to pay the same; and I, C. D., intend to receive the same, without any deduction or abatement whatsoever.*"

(a) Vide supra, p. 247.

(b) Vide supra, pp. 249, 352.

Declaration
to be signed
before licence.

Sect. 6. "Every person about to be licensed to a stipendiary curacy shall, before obtaining such licence, present to the archbishop or bishop by whom the licence is to be granted the stipendiary curate's declaration, signed by himself and by the incumbent of the benefice to which he is about to be licensed."

Stipendiary
curates to
make the
declaration
of assent.

Sect. 8. "Every person licensed to a stipendiary curacy shall in the presence of the archbishop or bishop by whom he was licensed, or of the commissary of such archbishop or bishop, (unless having been ordained on the same day, he has already made and subscribed the same), make and subscribe the declaration of assent, and, on the first Lord's day on which he officiates in the church or in one of the churches in which he is licensed to serve, publicly and openly make the declaration of assent in the presence of the congregation there assembled, and at the time of divine service.

"If any person licensed to a stipendiary curacy wilfully fails to comply with the provisions of this section his licence shall be void."

No oath or
other declara-
tion or
subscription
required.

Sect. 9. "Subject as hereinafter mentioned, no person shall . . . on or as a consequence of being licensed to any stipendiary curacy . . . be required to make any subscription or declaration, or take any oath, other than such subscriptions, declarations, and oath as are required by this act."

By sect. 12, however, nothing in the act is to affect the oath of canonical obedience to the bishop.

*Gates v.
Chambers.*

In the case of *Gates v. Chambers (c)*, Sir John Nicholl said on the construction of the 48th Canon: "Now, the object of this canon seems to be that curates who are engaged to take charge of parishes, either altogether or in part, for a continued time shall be examined and admitted by the diocesan. It may be very proper that curates within the meaning of the canon . . . should be examined and admitted by the diocesan in order to prevent persons, not being duly qualified, from being introduced into parishes in that character. But the defendant, in the instance in question, it should now seem, did not attend . . . in that character; nor was he acting as curate within the meaning of the canon so understood; he only came to officiate for the rector on a particular occasion." The learned judge did not think this act punishable as an ecclesiastical offence.

Old law.

The old law relating to curates is to be found in the statutes 12 Anne, st. 2, c. 12, 36 Geo. 3, c. 83, 53 Geo. 3, c. 149, and 57 Geo. 3, c. 99, all of which have been now repealed; in the constitutions of Archbishops Edmund, Islip, and Sudbury, and in Archbishop Wake's directions above mentioned (*d*).

On this subject the cases of *Pierson v. Atkinson (e)* and *Martyn v. Hind (f)*, and the charge of Bishop Horsley to the clergy of Rochester in 1796, may also be referred to.

(c) 2 Add. p. 177.

(d) Vide *supra*, p. 114.

(e) Freem. K. B. p. 69.

(f) Doug. p. 141 a; Cowp. p. 437.

The act 57 Geo. 3, c. 99, gave rise to two cases in the common law courts. The first in 1824—*Rex v. The Bishop of Peterborough* (*g*), in which Lord Chief Justice Abbott decided that a curate could not proceed by monition for the recovery of a salary assigned by a bishop, without the consent of the incumbent who was resident on and discharging the duties of his benefice. The case was elaborately argued on the construction of the 53rd section; and Lord Chief Justice Abbott said, that as a monition was not according to the general course of the ecclesiastical law in cases of a curate's claim to salary, and could be resorted to only when given by act of parliament, the salary must be assigned in strict conformity to the section of the act referred to, in order to found the ecclesiastical jurisdiction; and granted a prohibition because it had not been so assigned, remarking that his judgment did not decide the general question as to the effect of a salary assigned to a curate of a resident incumbent in conformity to his own proposal, or the authority of the bishop to entertain in any case a suit for a curate's salary in a formal manner according to the usage of the ecclesiastical law; but he thought the power to proceed by monition, in any case regarding the stipend of the curate of a residing incumbent, so questionable, as to be a subject for the consideration of the legislature. In 1837, in *West v. Turner* (*h*), an *indebitatus assumpsit* for 100*l.* was brought by a curate, and three judges decided that sect. 74 ousted the common law courts of any jurisdiction in disputes touching any stipend appointed by the bishop to a curate under the act, or the payment of arrears of such salary, and that the statute might be pleaded in bar to a suit at common law.

Decisions on
57 Geo. 3,
c. 99.

The legal status of the curate is now almost entirely regulated by the statute 1 & 2 Vict. c. 106. The 98th clause of that act, however, which relates to the power of bishops as to licensing and revoking the licences of curates, is very badly drawn, and so carelessly expressed, that doubts have arisen whether the operation of this statute as to this subject be not confined to the curates of non-resident incumbents. The question was considered by the Privy Council in the case of *Mr. Poole* (*i*), but not decided. Their lordships held that, at all events, the clause of a former statute which related to the curates of resident incumbents was in force. It has been supposed, but incorrectly, that this was an erroneous view of the law; because the immediately previous act, 57 Geo. 3, c. 99, had been decided to apply only to the curates of non-resident incumbents. But the law stood at the time of *Mr. Poole's* case as follows:—

Existing law.

The statute 36 Geo. 3, c. 83, s. 6, reciting that "It is expedient that the authority of ordinaries to license curates, and to remove licensed curates, should be further explained, enlarged and confirmed," enacted that "it shall be lawful for the ordinary to

36 Geo. 3,
c. 83.

(*g*) 3 B. & C. p. 47.

(*h*) 6 A. & E. p. 614; 1 Nev. & P. p. 612.

(*i*) *Poole v. Bp. of London*, 7 Jur.,

N. S. p. 347.

license any curate who is or shall be actually employed by the rector, vicar, or other incumbent of any parish church or chapel, although no express nomination of such curate shall have been made, either in words or in writing, to the ordinary by the said rector, vicar, or other incumbent; and that the ordinary shall have power to revoke, summarily, and without process, any licence granted to any curate employed within his jurisdiction, and to remove such curate for such good and reasonable cause as he shall approve: subject, nevertheless, to an appeal, as well in the case of a grant of a licence to a curate who has not been nominated, as in the revocation of a licence granted to a curate; such appeal to be made, in either case, to the archbishop of the province, and to be determined in a summary manner."

57 Geo. 3,
c. 99.

By 57 Geo. 3, c. 99, s. 1, it is enacted that "so much of the said recited act of the 36th year of the reign of his present majesty as relates to the maintenance of curates within the Church of England and making provision for appointing stipends for such curates . . . shall be repealed." This limited form of repeal left sect. 6 of 36 Geo. 3, c. 83, still in force.

Now, however, by "The Statute Law Revision Act, 1871," 34 & 35 Vict. c. 116, the whole of 36 Geo. 3, c. 83, is (apparently by inadvertence) repealed. It has been holden nevertheless that the right of appeal remains (*i*).

1 & 2 Vict.
c. 106.

The enactments of 1 & 2 Vict. c. 106, 34 & 35 Vict. c. 45, and 48 & 49 Vict. c. 54, with relation to curates, are as follows:—

Non-resident
incumbents
neglecting
to appoint
curates, the
bishop to
appoint.

1 & 2 Vict. c. 106, s. 75. "If any spiritual person holding any benefice, who shall not actually reside thereon nine months in each year (unless such person shall, with the consent of the bishop, from time to time, signified in writing under his hand and revocable at any time, perform the ecclesiastical duties of the same, he either being resident on another benefice, of which he shall also be the incumbent, or having a legal exemption from residence on his benefice, or having a licence to reside out of the same, or to reside out of the usual house of residence belonging to the same), shall for a period exceeding three months altogether, or to be accounted at several times, in the course of any one year absent himself from his benefice, without leaving a curate or curates duly licensed or approved by the bishop to perform such ecclesiastical duties, or shall, for a period of one month after the death, resignation, or removal of any curate who shall have served his church or chapel, neglect to notify such death, resignation, or removal to the bishop, or shall, for the period of four months after the death, resignation or removal, of such curate neglect to nominate to the bishop a proper curate, in every such case the bishop is hereby authorized to appoint and license a proper curate, with such salary as is by this act allowed and directed, to serve the church or chapel of the benefice in respect of which such neglect or default shall

(*i*) Vide *infra*, p. 439, *Mr. Baddeley's case*.

have occurred : Provided always, that such licence shall in every case specify whether the curate is required to reside within the parish or place, or not ; and if the curate is permitted by the bishop to reside out of the parish or place, the grounds upon which the curate is so permitted to reside out of the same shall be specified in such licence ; and the distance of the residence of any curate from any such church or chapel which he shall be licensed to serve shall not exceed three statute miles, except in cases of necessity, to be approved by the bishop, and specified in the licence."

Sect. 76. "In every case where a curate is appointed to serve in any benefice upon which the incumbent either does not reside or has not satisfied the bishop of his full purpose to reside during four months in the year, such curate shall be required by the bishop to reside within the parish or place in which such benefice is situate, or if no convenient residence can be procured within such parish or place, then within three statute miles of the church or chapel of the benefice in which he shall be licensed to serve, except in cases of necessity, to be approved of by the bishop and specified in the licence, and such place of residence shall also be specified in the licence."

Curate to reside on benefices, under certain circumstances.

Sect. 77. "Whenever the bishop shall see reason to believe that the ecclesiastical duties of any benefice are inadequately performed, it shall be lawful for him to issue a commission . . . and if the said commissioners or the major part of them report in writing under their hands to the said bishop that in their opinion the duties of such benefice are inadequately performed, it shall be lawful for such bishop, if he shall see fit, by writing under his hand, to require the spiritual person holding such benefice, though he may actually reside or be engaged in performing the duties thereof, to nominate to him a fit person or persons, with sufficient stipend or stipends, to be licensed by him to perform or to assist in performing such duties, specifying therein the grounds of such requisition ; and if such spiritual person shall neglect or omit to make such nomination for the space of three months after such requisition so made as aforesaid it shall be lawful for the bishop to appoint and license a curate or curates, as the case shall appear to him to require . . . ; and such bishop shall cause a copy of every such requisition, and the evidence to found the same, to be forthwith filed in the registry of his court : Provided always, that it shall be lawful for any such spiritual person within one month after the service upon him of such requisition to nominate a curate, or of notice of any such appointment and licence of such curate or curates, to appeal to the archbishop of the province, who shall approve or revoke such requisition, or confirm or annul such appointment, as to him may seem just and proper."

If duty inadequately performed, the bishop may issue a commission, and on the report appoint a curate ;

but incumbent may appeal.

And with respect to curates in Welsh dioceses it is enacted by sect. 105 as follows :—"All the provisions and powers of this act relating to the appointment of curates where the ecclesiastical duties are inadequately performed shall within the several dioceses

Provision for curates in certain Welsh dioceses.

of St. Asaph, Bangor, Llandaff, and St. David's extend and apply to cases wherein the bishop shall see reason to believe that the ecclesiastical duties of any benefice are not satisfactorily performed by reason of the insufficient instruction in the Welsh language of the spiritual person serving such benefice."

Stipend to be paid by committee of lunatic's estate.

By sect. 79. "In case of a stipend being assigned by the bishop, according to the provisions of this act, to the curate of any benefice, the incumbent whereof shall have been duly found a lunatic or person of unsound mind, the committee of the estate of any such lunatic or person of unsound mind shall pay such stipend to such curate out of the profits of the benefice which shall come to his hands."

Bishops may enforce two services on Sundays in certain cases.

With regard to the amount of duty, it is enacted as follows:—Sect. 80. "It shall be lawful for the bishop, in his discretion, to order that there shall be two full services, each of such services, if the bishop shall so direct, to include a sermon or lecture on every Sunday throughout the year, or any part thereof, in the church or chapel of every or any benefice within his diocese, whatever may be the annual value or the population thereof; and also in the church or chapel of every parish or chapelry, where a benefice is composed of two or more parishes or chapelries, in which there shall be a church or chapel, if the annual value of the benefice arising from that parish or chapelry shall amount to one hundred and fifty pounds, and the population of that parish or chapelry shall amount to four hundred persons: Provided always, that nothing herein contained shall be taken to repeal or affect the provisions of an act (58 Geo. 3, c. 45), by which the bishop of any diocese is empowered to direct the performance of a third or additional service in the several churches or chapels within his diocese under the circumstances therein mentioned" (j).

Not to affect the provision of the act 58 Geo. 3, c. 45, s. 65, as to third service.

48 & 49 Vict. c. 54.

By 48 & 49 Vict. c. 54, s. 2, "The term 'ecclesiastical duties' in the first-mentioned act and this act shall include not only the regular and due performance of divine service on Sundays and holidays, but also all such duties as any clergyman holding a benefice is bound by law to perform, or the performance of which is solemnly promised by every clergyman of the Church of England at the time of his ordination, and the performance of which shall have been required of him in writing by the bishop; and in the case of benefices within the dioceses of St. Asaph, Bangor, Llandaff, and St. David's, and the county of Monmouth, shall also include such ministrations in the Welsh language as the bishop of the diocese shall direct to be performed by the clergymen holding such benefices respectively, but so that such bishop shall not in any such case require more than one service in the Welsh language on every Sunday in such church or chapel of ease situated in any such benefice: Provided always,

(j) That is, when the existing churches in the parish cannot accommodate the population, the incumbent is required to nominate

a curate to perform the service; and if he fails to nominate, the bishop may appoint one (s. 65).

that due provision be made for the English-speaking portion of the population."

By sect. 3, Instead of the commissioners provided by sect. 77 of 1 & 2 Vict. c. 106, "such commission shall be issued to four commissioners, one of whom shall be an archdeacon or rural dean of the archdeaconry or rural deanery wherein the benefice is situated; one other of such commissioners shall be a canon residentiary, prebendary, or honorary canon of the cathedral church of the diocese wherein the benefice is situated, elected as hereinafter provided; one other of such commissioners shall be a beneficed clergyman of the archdeaconry wherein the benefice is situated, also elected as hereinafter provided; one other of such commissioners shall be a layman in the commission of the peace for the county wherein the benefice is situated nominated for the purpose of such commission, on the requisition of the bishop, by the person who presided as chairman of the quarter sessions for the county or division of the county last preceeding such requisition, or if there be no such person, then by the lord lieutenant of the county; and it shall be lawful for the incumbent of the said benefice to add to such commission one other commissioner, being either an incumbent of a benefice within the same diocese, or a magistrate in the commission of the peace.

Repeal of so much of s. 77 of 1 & 2 Vict. c. 106, as relates to the persons to act as commissioners on inquiries as to inadequate performance of ecclesiastical duties. Persons to act as commissioners on inquiries as to inadequate performance of ecclesiastical duties.

"The bishop shall give to the clergyman holding the benefice notice in writing of his intention to issue such commission, and if such clergyman shall not within fourteen days after the sending of such notice nominate in writing to the bishop one such commissioner as aforesaid to act with the other commissioners on such commission, such other commissioners may proceed alone."

By sect. 4, Deans and chapters or canons of cathedral churches are to appoint triennially one of their body to act as a commissioner (*k*).

Election of commissioners.

By sect. 5, The beneficed clergy of every archdeaconry are to elect triennially a beneficed clergyman of the archdeaconry to act as commissioner (*l*).

As to both these appointments "in case any such vacancy shall occur by death, resignation, or otherwise, during any triennial period, the same shall be forthwith supplied and certified in like manner, and the person so elected shall continue in office until the end of the then current triennial period."

By sects. 6 and 7, The attendance of witnesses and production of documents may be compelled, and witnesses are to be examined on oath and to be liable to punishment for perjury.

Attendances of witnesses, &c.

By sect. 8, "The bishop may assign to any curate or curates appointed and licensed by him under any of the provisions of section seventy-seven of the first mentioned act such stipend or stipends as he shall think fit to appoint, not exceeding by seventy pounds the respective stipends allowed to curates by the same

Bishop may assign extra stipend of 70*l*. to curate appointed by him under s. 77 of 1 & 2 Vict. c. 106.

(*k*) Vide supra, p. 172.

(*l*) Vide supra, p. 207.

act in the case of non-resident incumbents, but so nevertheless that any stipend or stipends so augmented shall not exceed the sum of one hundred and fifty pounds, except in cases where the whole net income of the benefice exceeds the sum of three hundred pounds a year."

Where incumbent non-resident and population of benefice exceeds 2,000 or there are two or more churches not less than a mile apart, bishop may require two or more curates.

By sect. 9, "Where the population of a benefice, the incumbent of which is non-resident, shall exceed two thousand persons, or where there are two or more churches belonging to such benefice, not less than a mile apart, notwithstanding that the annual value of such benefice be less than four hundred pounds, the bishop may require the incumbent thereof to nominate to him two or more persons to be licensed as curates; and if such spiritual person neglect or omit to make such nomination for the space of three months after such requisition, it shall be lawful for the bishop to appoint and license two or more curates, and to assign to such curates respectively such stipends as the bishop shall think fit, not exceeding the respective stipends sanctioned by the last preceding section of this act, but so, nevertheless, that the whole of the stipends to the curates serving any such benefice shall not exceed altogether two-third parts of the net annual income of such benefice, and the incumbent of such benefice shall be entitled to the like right of appeal to the archbishop as is provided by the eighty-sixth section of the first mentioned act (*m*)."

Saving as to charges.

By s. 11, "Nothing in this act contained shall prejudice the provisions of sect. 15 of 1 Vict. c. 23, or sects. 91, 92, 94 of 1 & 2 Vict. c. 106, or of 'the Ecclesiastical Dilapidations Act, 1871 (*n*),' or any mortgage or charge duly created under any act of parliament upon the profits of any benefice which may come under the operation of this act."

Non-resident incumbent not to return to his benefice or interfere with curate until the expiration of his licence of non-residence, without bishop's permission.

Sect. 12, "Whenever the incumbent of any benefice is non-resident with the licence of the bishop, he shall not be at liberty, without the bishop's permission, to resume the duties of his benefice before the expiration of the period mentioned in such licence, nor shall he if non-resident for more than twelve months during such time interfere with the discharge of the duties of the benefice as entrusted to the curate or curates thereof by the bishop."

Repeal of s. 78 of 1 & 2 Vict. c. 106.

By sect. 13, instead of the provisions of 1 & 2 Vict. c. 106, s. 78, it is enacted that "whenever the annual value of any benefice shall exceed five hundred pounds and the population thereof shall amount to three thousand persons, or, though the population do not amount to three thousand persons, if there be in the said benefice a second church or chapel with a hamlet or district containing four hundred persons, it shall be lawful for the bishop, if he shall see fit, to require the clergyman holding

(*m*) i.e., 1 & 2 Vict. c. 106; vide *infra*, p. 432.

(*n*) These are all provisions as to

charges on benefices. Vide *infra*, pp. 435, 436, Part V., Chap. II., and Part V., Chap. V.

such benefice, although he shall be resident thereon or engaged in performing the duties thereof, to nominate a fit and proper person to be licensed as a curate to assist in performing the duties of such benefice and to be paid by the person holding the same; and if a fit person shall not be nominated to the bishop within three months after his requisition for that purpose shall have been delivered to the incumbent or left at his last or usual place of abode, it shall be lawful for the bishop to appoint and license a curate, with such stipend as he shall think fit to appoint, not exceeding one hundred and fifty pounds: Provided always, that such clergyman may, within one month after service upon him of such requisition to nominate a curate or of notice of any such appointment of a curate, appeal to the archbishop of the province, who shall approve or revoke such requisition, or confirm or annul such appointment, as to him may appear just and proper."

Sect. 15, "Every notice, requisition, nomination, or certificate to be given or sent pursuant to any of the provisions herein contained shall be deemed to have been duly given or sent if sent through the post in a prepaid registered letter, addressed, in the case of an incumbent, to the parish or place whereof he is incumbent; and where a clergyman is out of England, without licence of non-residence, and without having made due provision for the performance of his ecclesiastical duties during his absence, every monition, instrument, or notice to be served on him pursuant to any of the provisions of the first-mentioned act (o) may be served in the manner in sect. 112 of the same act provided in the case of a clergyman who cannot be found, and the words 'place of residence' in that section shall mean place of residence in England."

By 1 & 2 Vict. c. 106, sect. 106, "No spiritual person shall serve more than two benefices in one day unless in case of unforeseen and pressing emergency, in which case the spiritual person who shall so have served more than two benefices shall forthwith report the circumstance to the bishop of the diocese."

Sect. 81. "Every bishop to whom any application shall be made for any licence for a curate to serve for any person not duly residing upon his benefice shall, before he shall grant such licence, require a statement of all the particulars by this act required to be stated by any person applying for a licence for non-residence."

As to the fees for such licence, by sect. 82, "Every curate obtaining such licence as aforesaid shall pay to the secretary or other proper officer of the bishop for the same the sum of ten shillings, over and above any stamp duty which may be chargeable thereon, which sum of ten shillings shall be in lieu of all fees heretofore demandable by such secretary or officer for such licence, or for any certificate connected therewith."

Notices, &c. may be sent by post in registered letter.

Service of monitions, &c. where spiritual person out of England, &c.

1 & 2 Vict. c. 106, s. 106.

No spiritual person to serve more than two benefices in one day.

Statement of particulars necessary to be given on application for a licence for a curate.

Fees for licence.

(o) i.e., 1 & 2 Vict. c. 106; vide infra, Part V., Chap. VII.

Bishop shall
appoint
stipends to
curates ;

and decide
differences
respecting
them.

No appeal.

Stipends to
curates of
non-resident
incumbents to
be according to
specified scale,
proportioned
to the value
and popula-
tion of the
benefice.

Larger
stipends in
certain cases
of larger
value and
population.

As to stipends, it is enacted as follows :—

Sect. 83. "It shall be lawful for the bishop of the diocese and he is hereby required, subject to the several provisions and restrictions in this act contained, to appoint to every curate of a non-resident incumbent such stipend as is specified in this act; and every licence to be granted to a stipendiary curate, whether the incumbent of the benefice be resident or non-resident thereon, shall specify the amount of the stipend to be paid to the curate; and in case any difference shall arise between the incumbent of any benefice and his curate touching such stipend, or the payment thereof or of the arrears thereof, the bishop, on complaint to him made, may and shall summarily hear and determine the same, without appeal; and in case of wilful neglect or refusal to pay such stipend or the arrears thereof, he is hereby empowered to enforce payment of such stipend, or the arrears thereof, by monition and by sequestration of the profits of such benefice."

Sect. 85. "In every case in which any spiritual person shall . . . be instituted, inducted, nominated, or appointed to, or otherwise become incumbent of, any benefice, and shall not duly reside thereon, the bishop shall appoint for the curate licensed under the provisions of this act to serve such benefice such stipend as is hereinafter next mentioned: (that is to say,) such stipend shall in no case be less than eighty pounds per annum, or than the annual value of the benefice, if such value shall not amount to eighty pounds; nor less than one hundred pounds per annum, or than the whole value, if such value shall not amount to one hundred pounds, in any parish or place where the population shall amount to three hundred persons; nor less than one hundred and twenty pounds per annum, or than the whole value, if such value shall not amount to one hundred and twenty pounds, in any parish or place where the population shall amount to five hundred persons; nor less than one hundred and thirty-five pounds per annum, or than the whole value, if such value shall not amount to one hundred and thirty-five pounds, in any parish or place where the population shall amount to seven hundred and fifty persons; nor less than one hundred and fifty pounds per annum, or than the whole value, if such value shall not amount to one hundred and fifty pounds, in any parish or place where the population shall amount to one thousand persons."

Sect. 86. "Where the annual value of any such benefice shall exceed four hundred pounds (*q*), it shall be lawful for the bishop to assign to the curate, being resident within the same, and serving no other cure, a stipend of one hundred pounds, notwithstanding the population may not amount to three hundred persons; and where the annual value of any such benefice shall exceed four hundred pounds, and the population shall

(*q*) This has been extended by 48 & 49 Vict. c. 54, s. 9, vide supra, p. 430.

amount to five hundred persons, it shall be lawful for the bishop to assign to the curate, being resident within the same, and serving no other cure, any larger stipend, so that the same shall not exceed by more than fifty pounds per annum the amount of the stipend hereinbefore required to be assigned to any such curate; and where the population of any such benefice shall exceed two thousand persons, it shall be lawful for the bishop to require the incumbent thereof to nominate to him two persons to be licensed as curates; and if such spiritual person shall neglect or omit to make such nomination for the space of three months after such requisition so made as aforesaid, it shall be lawful for the bishop to appoint and license two curates or a second curate, and in all and every of such cases to assign to each curate so nominated or appointed such stipend as he shall think fit, not exceeding together the highest rate of stipend allowed by this act in the case of one such curate, except in cases where the incumbent shall consent to a larger stipend: Provided always, that such incumbent may within one month after service upon him of such requisition, or of notice of any such appointment of two curates or a second curate, appeal to the archbishop of the province, who shall approve or revoke such requisition or confirm or annul such appointment as to him may appear just and proper."

Bishop may require two curates.

Appeal.

Sect. 87. "In every case in which the bishop shall be satisfied that any spiritual person holding any benefice within his diocese is non-resident or has become incapable of performing the duties thereof from age, sickness, or other unavoidable cause, and that, from these or from any other special and peculiar circumstances, great hardship or inconvenience would arise if the full stipend specified in this act should be allowed to the curate of such benefice, it shall be lawful for such bishop, with the consent of the archbishop of the province, to be signified in writing under the hand of the said archbishop upon the licence to be granted to such curate, to assign to the curate such stipend less than the full amount in this act specified as shall appear to him just and reasonable: Provided always, that in the licence granted in every such case it shall be stated that for special reasons the bishop hath not thought proper to assign to the curate the full stipend required by this act: provided also, that such special reasons shall be entered fully in a separate book to be kept for that purpose, and to be deposited in the registry of the diocese, which book shall be open to inspection with the leave of the bishop, as in the cases of application for licences for non-residence."

Smaller stipends in certain cases.

Sect. 88. "If any incumbent of two benefices, residing *bonâ fide* in different proportions of every year on one or other of such benefices the full period specified by this act, shall employ a curate to perform ecclesiastical duty interchangeably from time to time upon such of the benefices from which he shall be absent during his own actual residence upon the other thereof,

Stipend of curate engaged to serve interchangeably at different benefices belonging to the same incumbent.

it shall be lawful for the bishop to assign to such curate any stipend not exceeding such stipend as would be allowed under this act for the larger of such benefices, nor less than would be allowed for the smaller, as to the bishop shall under all the circumstances appear just and reasonable: Provided always, that if any such incumbent shall employ a curate or curates for the whole year upon each of such benefices, such incumbent so residing *bonâ fide* as aforesaid, in such case it shall be lawful for the bishop to assign to either or each of such curates any such stipend less than the amount specified in this act as he shall think fit."

How the stipends shall be adjusted where the curate is permitted to serve in two adjoining parishes.

Sect. 89. "In every case where the bishop shall find it necessary or expedient for obtaining the proper performance of ecclesiastical duties to licence any spiritual person holding any benefice to serve as curate of any adjoining or other parish or place, it shall be lawful for such bishop, if he shall think fit, to assign to such person so licensed a stipend less by a sum not exceeding thirty pounds per annum than the stipend which in the several cases in this act specified the bishop is required to assign; and in every case where the bishop shall find it necessary or expedient to license the same person to serve as curate for two parishes or places, it shall be lawful for such bishop, if he shall think fit, to direct that during such time as such curate shall serve the churches or chapels of such two parishes or places the stipend to be received by him for serving each of the said churches or chapels shall be less by a sum not exceeding thirty pounds per annum than the stipend which in the several cases hereinbefore specified the bishop is required by this act to assign."

Agreements for stipends to curates contrary to this act void.

Sect. 90. "All agreements made or to be made between persons holding benefices and their curates, in fraud or derogation of the provisions of this act, and all agreements whereby any curate shall undertake or in any manner bind himself to accept or be content with any stipend less than that which shall be assigned by his licence, shall be void to all intents and purposes, and shall not be pleaded or given in evidence in any court of law or equity; and notwithstanding the payment and acceptance, in pursuance of any such agreement, of any sum less than that assigned by the licence, or any receipt, discharge, or acquittance that may be given for the same, the curate and his personal representatives shall be and remain entitled to the full amount of the stipend assigned by his licence; and the payment of so much thereof as shall be proved to the satisfaction of the bishop to remain unpaid shall, together with full costs of recovering the same as between proctor and client, be enforced by monition, and by sequestration of the profits of the benefice, to be issued by the bishop for that purpose on application made by the curate or his representatives; Provided that such application shall in every such case be made to the bishop within twelve months after such curate shall have quitted his curacy, or have died."

Sect. 91. "In every case in which the bishop shall assign to any curate a stipend equal to the whole annual value of the benefice in which he is licensed to serve, such stipend shall be subject to deduction in respect to all such charges and outgoings as may legally affect the value of such benefice, and to any loss or diminution which may lessen such value, without the wilful default or neglect of the spiritual person holding the benefice."

Curate's stipend, if of the value of the benefice, liable to all charges.

Sect. 92. "In every such case as last aforesaid it shall be lawful for the bishop, upon the application of the spiritual person holding the benefice, to allow such spiritual person to retain in each year so much money, not exceeding in any case one fourth part of the annual value, as shall have been actually expended during the year in the repair of the chancel and of the house of residence and premises and appurtenances thereto belonging, in respect of which such spiritual person, or his executors or administrators, would be liable for dilapidations to the successor; and it shall also be lawful for the bishop in like manner to allow any spiritual person holding any benefice the annual value whereof shall not exceed one hundred and fifty pounds to deduct from the stipend assigned to the curate in each year so much money as shall have been actually expended in such repairs above the amount of the surplus remaining of such value after payment of such stipend; Provided that the sum so deducted, after laying out such surplus, shall not in any year exceed one fourth part of such stipend."

Bishop may allow incumbent to deduct from curate's stipend for repairs to a limited amount, in certain cases.

With regard to the residence of curates it is enacted as follows:—

Sect. 93, "It shall be lawful for the bishop who shall have granted any licence to any curate to serve in any benefice the incumbent whereof is not resident for four months in each year, and who shall have required such curate to reside in the house of residence belonging to the benefice, to assign to such curate such house of residence, together with the offices, stables, gardens, and appurtenances thereto belonging, or any part or parts thereof, without payment of any rent, and also to assign any portion of glebe land adjacent to the house, and not exceeding four statute acres, at such rent as shall be fixed by the archdeacon of the archdeaconry, or by the rural dean, if any, of the deanery or district within which the benefice is situate, and one neighbouring incumbent, and approved of by the bishop, during the time of such curate's serving the cure, or during the non-residence of the incumbent of such benefice; and it shall be lawful for the bishop making any such assignment to any curate to sequester the profits of the benefice in any case in which possession of the premises so assigned shall not be given up to the curate, and until such possession shall be given, and to direct the application of the profits arising from such sequestration as is hereinbefore directed in the case of sequestration for non-residence, or to remit the same or any part thereof, as the bishop shall in his discretion think fit."

Curate directed to reside in parsonage house in case of non-residence of incumbent, may have certain portion of glebe assigned to him by bishop.

Curates to pay taxes of parsonage houses in certain cases.

Sect. 94. "In every case where the bishop shall assign to the curate licensed to serve in any benefice a stipend not less than the whole value of the same, and shall in addition to such stipend direct that such curate shall reside in the house of residence belonging to such benefice, such curate shall be liable during the time of his serving such cure to the same taxes and parochial rates and assessments, in respect of such house, premises, and appurtenances thereto belonging, as if he had been incumbent of the benefice: Provided always, that in every other case in which the curate shall so reside by direction of the bishop it shall be lawful for such bishop, if he shall think fit, to order that the incumbent shall pay to the curate all or any part of such sums as he may have been required to pay and shall have actually paid within one year ending at Michaelmas-day next preceding the date of such order for any such taxes, parochial rates, or assessments as shall become due at any time after the passing of this act, and the bishop may, if necessary, enforce payment thereof by monition, and sequestration of the profits of such benefice."

With regard to the power of the incumbent to dismiss a curate it is enacted as follows:—

Curate to quit cure upon having six weeks' notice from new incumbent within six months after his admission, and in other cases incumbent, with bishop's permission, may dispossess curate of cure on six months' notice.

Sect. 95. "Every curate shall quit and give up the cure of any benefice which shall become vacant upon having six weeks' notice from the spiritual person admitted, collated, instituted, or licensed to such benefice, provided such notice shall be given within six months from the time of such admission, collation, institution, or licence; and in all other cases it shall be lawful for the incumbent of any benefice, whether resident or non-resident thereon, having first obtained the permission of the bishop of the diocese, to be signified by writing under his hand, to require any one or more of his curates, who, after the passing of this act, shall be licensed to any curacy, to quit and give up his curacy, upon six months' notice thereof given to the curate, who shall thereupon quit the same according to such notice: Provided always, that any incumbent resident on his benefice, or not resident but desiring to reside on his benefice, may, within one month after refusal of such permission as aforesaid by the bishop, appeal to the archbishop of the province, who shall either confirm such refusal or grant such permission as to him may seem just and proper."

Appeal.

Decisions on section.

An ordinary notice in writing is sufficient, and the provisions of sect. 112 (*r*) do not apply (*s*).

The minister of a proprietary chapel, having the licence of the bishop granted with the consent of the previous incumbent is not a curate within the meaning of this section (*t*), and is, therefore, not entitled to a notice.

(*r*) Vide *infra*, p. 442, and Part IV., Chap. VII.

(*s*) See *Tanner v. Scrivener*, 13

P. D. p. 128.

(*t*) *Richards v. Fincher*, L. R.

4 Adm. & Eccl. p. 255.

Sect. 96. "Every curate who shall reside in the house of residence of any benefice which shall become vacant shall peaceably deliver up possession thereof, with the appurtenances, upon having six weeks' notice from the spiritual person admitted, collated, instituted, or licensed to such benefice, provided such notice be given within six months from the time of such admission, collation, institution, or licence; and in all other cases it shall be lawful for the incumbent of any benefice, with the permission signified in writing under the hand of the bishop of the diocese, or for such bishop, at any time, upon six months' notice in writing, to direct any curate to deliver up the house of residence, and the offices, stables, gardens, and appurtenances thereto belonging, and such portion of the glebe land as shall have been assigned to such curate, and such curate shall thereupon peaceably deliver up the possession of the premises pursuant to such notice; and if any curate shall refuse to deliver up such premises in any or either of the cases aforesaid, he shall pay to the spiritual person holding the benefice the sum of forty shillings for every day of wrongful possession after the service of such notice."

Curate peaceably to deliver up possession of house of residence after notice, or pay 40s. per day.

With regard to the curate's power of quitting his curacy it is enacted:—

Sect. 97, "No curate shall quit any curacy to which he shall be licensed until after three months' notice of his intention given to the incumbent of the benefice and to the bishop, unless with the consent of the bishop, to be signified in writing under his hand, upon pain of paying to the incumbent a sum not exceeding the amount of his stipend for six months, at the discretion of the bishop, such sum to be specified in writing under the hand of the bishop, which sum may in such case be retained out of the stipend if the same or any part thereof shall remain unpaid, or, if the same cannot be retained out of the stipend, may be recovered by the spiritual person holding the benefice by action of debt."

Curate not to quit curacy without three months' notice to incumbent and bishop, under a penalty.

With regard to the power of the bishop over the curate the enactment is in the following ambiguous and careless language:—

Sect. 98. "It shall be lawful for the bishop to license any curate who is or shall be actually employed by any non-resident incumbent of any benefice within his diocese, although no express nomination of such curate shall have been made to such bishop by the incumbent; and the bishop shall have power, after having given to the curate sufficient opportunity of showing reason to the contrary, to revoke, summarily, and without further process, any licence granted to any curate, and to remove such curate, for any cause which shall appear to such bishop to be good and reasonable: Provided always, that any such curate may, within one month after service upon him of such revocation, appeal to the archbishop of the province, who shall confirm or annul such revocation as to him shall appear just and proper."

Bishop may license curates employed without nomination, revoke any licence, and remove any curate, subject to appeal to the archbishop.

It was decided by the Court of Queen's Bench in *Mr. Poole's*

Cases on this section.

Case, that the archbishop must hear the appellant (*u*) before he decides, and by the Privy Council, that the appeal to the archbishop is final (*x*).

In *Sedgwick v. The Bishop of Manchester*, decided in March, 1869, by the Archbishop of York, assisted by Lord Chelmsford as assessor, it was holden that a licence to a clergyman to perform divine service in an unconsecrated church, to which a conventional district was attached within the town and parish of Manchester, of which parish the cathedral is the parish church, and the dean and canons have the cure of souls, was not such a licence that the revocation thereof by the bishop could be made a matter of appeal by the clergyman licensed, as if he were a curate, to the archbishop.

In the *Mr. Poole's Case* already mentioned, Dr. Lushington, sitting as assessor to the archbishop on the appeal, held that the last clause of the section gives the bishop, subject to appeal, the widest and most unlimited discretion. He may remove not only for an act cognizable under the Clergy Discipline Act (*y*), but also for a cause which would not constitute an ecclesiastical offence so cognizable. No mode of proceeding is directly or indirectly indicated by the act. The bishop is permitted to take his own course, unfettered by any legal form or restriction, provided that such course is consistent with substantial justice; and this requires that in whatever mode the accusation is preferred, it shall be sufficiently definite to enable the accused to defend himself. An ample intimation of the matter to be inquired into, whether criminal or otherwise, is indispensable.

A notice from the bishop that he intends to revoke the licence of a curate, in which he appoints a time for such curate to attend him and show cause, if he has any, to the contrary, is not a notice falling within the provisions of the 112th section (*z*).

In *Mr. Denison's Case* before the Archbishop of Canterbury and Dr. Deane, Q.C., his Vicar-General sitting as assessor, decided on the 8th of July, 1872, the following points were ruled:—

(1) That the bishop, giving a curate “sufficient opportunity of showing reason to the contrary” before revoking his licence, is not bound to give this opportunity by notice in writing; and may, if he does give a notice in writing, do so without specifying in that notice the reasons for the intended revocation, if those reasons sufficiently appear from previous oral information to the curate or otherwise.

(2) That an instrument of revocation need not necessarily recite the reasons for which the licence is revoked.

(3) That where the bishop in an interview with the curate

(*u*) *Regina v. Archbishop of Canterbury*, 28 L. J., Q. B. p. 154; 7 W. R. p. 212.

(*x*) *Poole v. Bp. of London*, 7 Jur., N. S. p. 347.

(*y*) 3 & 4 Vict. c. 86.

(*z*) *Poole v. Bp. of London*, 5 Jur., N. S. p. 522; vide *infra*, p. 442, and Part IV., Chap. VII.

condemned certain admitted acts of the curate, and stated that he intended to issue a formal prohibition of such acts, he is not entitled to revoke the licence of the curate on account of his past acts so admitted, censured and intended to be prohibited, without giving the curate an opportunity of acting upon and obeying the prohibition.

In *Mr. Baddeley's Case*, decided before the same court on the 13th of December, 1872, the objection was formally taken that sect. 98 of 1 & 2 Vict. c. 106, did not apply to the curates of resident incumbents, and that, therefore, since the repeal of 36 Geo. 3, c. 83, s. 6, (a) the bishop had no power to revoke the licences of such curates or they to appeal to the archbishop. The court, however, decided that that section of 1 & 2 Vict. c. 106, applied equally to the curates of resident as to those of non-resident incumbents. Since that time other similar appeals have been heard.

With regard to sequestered benefices, it is enacted as follows:—

Sect. 99, "In every case in which a benefice shall be under sequestration, except for the purpose of providing a house of residence as aforesaid, it shall be lawful to the bishop, and he is hereby required, if the incumbent shall not perform the duties of the said benefice, to appoint and license a curate or curates thereto, and to assign to him or them a stipend or stipends not exceeding, in the case of any one such curate, the highest rate of stipend allowed by this act, nor, where more than one curate is appointed, a stipend exceeding one hundred pounds to more than one such curate, such stipend or stipends to be paid by the sequestrator of such benefice out of the profits thereof: Provided always, that not more than one curate shall be appointed to any such benefice in any case in which there is not more than one church, or the population does not exceed two thousand persons."

Bishop may appoint curates to all sequestered benefices.

The provisions as to curates serving benefices under sequestration during the vacancy have been already given (b).

In 1871 a statute (34 & 35 Vict. c. 45) was passed in order to provide for some consequences of sequestrations. The provisions of this act applicable to curates are as follows:—

34 & 35 Vict. c. 45.

Sect. 1. "Where . . . under a judgment recovered against the incumbent of a benefice as defined in the Incumbents' Resignation Act, 1871 (c), or under the bankruptcy of such incumbent, a sequestration issues and the same remains in force for a period of six months, the bishop of the diocese shall from and after the expiration of such period of six months, and as long as the sequestration remains in force, take order for the due performance of the services of the church of the benefice, and shall have power to appoint and license for this purpose such curate or curates, or additional curate or curates, as the case may require, with such stipend in each case as the bishop thinks fit, the amount thereof to be specified in the licence, and the

On sequestration bishop to appoint curate and assign stipend.

(a) Vide supra, p. 425.

(b) Vide supra, p. 376; and infra,

Part IV., Chap XII., sect. 5.

(c) Vide supra, p. 389.

bishop may at any time revoke any such appointment and licence: Provided always that such stipend or stipends shall not exceed in the whole the following sums; that is to say, if the population shall not exceed five hundred, the sum of 200*l.* yearly; if the population shall exceed five hundred but not one thousand, the sum of 300*l.* yearly; if the population shall exceed one thousand but not three thousand, the sum of 500*l.* yearly; if the population shall exceed three thousand, the sum of 600*l.* yearly: Provided also that such stipend or stipends shall not exceed in the whole two-thirds of the annual value of the benefice as defined in the last-mentioned act."

Payment of stipend.

Sect. 3. "Every stipend assigned under this act shall be paid by the sequestrator out of moneys coming to his hands under the sequestration, as long as the sequestration is in force, in priority to all sums payable by virtue of the judgment or the bankruptcy under which the sequestration issues, but not in priority of liabilities in respect of charges on the benefice."

Incorporation of former act.

Sect. 2 of the last mentioned act incorporates and adopts for the purposes of sect. 1, all the provisions in 1 & 2 Vict. c. 106, ss. 107, 108, and 109. And sect. 4 similarly adopts for the purposes of sect. 3, the provisions in 1 & 2 Vict. c. 106, ss. 75, 76, 82, 97, and 102.

Sect. 102 of 1 & 2 Vict. c. 106 is as follows:—

Licences to curates, and revocations thereof, to be entered in the registry of the diocese.

"Every bishop who shall grant or revoke any licence to any curate under this act shall cause a copy of such licence or revocation to be entered in the registry of the diocese; and an alphabetical list of such licences and revocations shall be made out by the registrar of each diocese, and entered in a book, and kept for the inspection of all persons, upon payment of three shillings, and no more; and a copy of every such licence and revocation shall be transmitted by the said registrar to the churchwardens or chapelwardens of the parish, township, or place to which the same relates, within one month after the grant of such licence or revocation thereof, to be by them deposited in the parish chest: Provided always, that every such registrar shall for every such copy transmitted to such churchwardens or chapelwardens as aforesaid be entitled to demand and receive from the incumbent of such benefice a fee of three shillings, and no more: Provided also, that in case the archbishop shall, on appeal to him, annul the revocation of any such licence, the bishop by whom such revocation shall have been made shall, immediately on receiving notice from the archbishop that he had annulled the same, make such or the like order as is hereinbefore directed to be made on the revocation of a licence for non-residence being annulled, which order shall be binding on the registrar and churchwardens respectively to whom the same shall be addressed."

With regard to the general authority of archbishops and bishops, it is enacted as follows:—

Provisions relating to bishops to

Sect. 107. "All the powers, authorities, provisions, regulations, matters, and things in this act contained, in relation to

bishops in their dioceses, shall extend and be construed to extend to the archbishops in the respective dioceses of which they are bishops, and also in their own peculiar jurisdictions, as fully and effectually as if the archbishops were named with the bishops in every such case.”

apply to archbishops in their own dioceses.

Sect. 108. “Every archbishop and bishop within the limits of whose province or diocese respectively any benefice exempt or peculiar shall be locally situate, shall, except as herein otherwise provided, have, use, and exercise all the powers and authorities necessary for the due execution by them respectively of the provisions and purposes of this act, and for enforcing the same with regard thereto respectively, as such archbishop and bishop respectively would have used and exercised if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop; and where any benefice exempt or peculiar shall be locally situate within the limits of more than one province or diocese, or where the same or any of them shall be locally situate between the limits of the two provinces, or between the limits of any two or more dioceses, the archbishop or bishop of the cathedral church to whose province or diocese the parish church of the same respectively shall be nearest in local situation shall have, use, and exercise all the powers and authorities which are necessary for the due execution of the provisions of this act, and enforcing the same with regard thereto respectively as such archbishop or bishop could have used if the same were not exempt or peculiar, but were subject in all respects to the jurisdiction of such archbishop or bishop respectively, and the same for all the purposes of this act shall be deemed and taken to be within the limits of the province or diocese of such archbishop or bishop; provided that the peculiars belonging to any archbishopric or bishopric, though locally situate in another diocese, shall continue subject to the archbishop or bishop to whom they belong, as well for the purposes of this act as for all other purposes of ecclesiastical jurisdiction.”

Power of archbishops and bishops as to exempt or peculiar benefices, &c.

Sect. 109. “In every case in which jurisdiction is given to the bishop of the diocese or to any archbishop, under the provisions of this act and for the purposes thereof, and the enforcing the due execution of the provisions thereof, all other and concurrent jurisdiction in respect thereof shall, except as herein otherwise provided, wholly cease, and no other jurisdiction in relation to the provisions of this act shall be used, exercised, or enforced, save and except such jurisdiction of the bishop and archbishop under this act, anything in any act or acts of parliament, or law or laws, or usage or custom, to the contrary notwithstanding.”

Where jurisdiction is given to bishops, &c., all concurrent jurisdiction to cease.

Sect. 132. “Nothing in this act contained shall be deemed, construed or taken to derogate from, diminish, prejudice, alter or affect, otherwise than is expressly provided, any powers, authorities, rights, or jurisdiction already vested in or belonging to

Act not to affect powers of bishops.

any archbishop or bishop under or by virtue of any statute, canon, usage, or otherwise howsoever."

Procedure.

With regard to the form of procedure sect. 111 as to the mode of appealing to the archbishop of the province, sect. 112 as to the service of monitions and sequestrations, sect. 110 as to the priority of sequestration under this act, and sects. 114, 115, 116, 117, 118, 119, dealing with the recovery of penalties and their application, the recovery of fees and the duty of the registrar, will be found at length in the chapter on procedure under this act (c).

**Commence-
ment and
conclusion of
the year.**

Sect. 120. "For all the purposes of this act, except as herein otherwise provided, the year shall be deemed to commence on the first day of January, and be reckoned therefrom to the thirty-first day of December, both inclusive."

**How months
to be calcu-
lated.**

Sect. 121. "For all the purposes of this act the months therein named shall be taken to be calendar months, except in any case in which any month or months are to be made up of different periods less than a month, and in every such case thirty days shall be deemed a month."

**Certified
copy of entry
to licence to
be evidence.**

Sect. 122. "In every case where by the provisions of this act the copy of any licence is required to be filed or entered in the registry of the diocese, a copy thereof, certified by the registrar, shall be admissible as evidence in all courts and places whatever."

**Statements,
how to be
verified.**

Sect. 123. "When authority is given by this act to any archbishop or bishop to require any statement or facts to be verified by evidence, or to inquire or to cause inquiry to be made into any facts, such archbishop or bishop may require any such statement or any of such facts to be verified in such manner as the said archbishop or bishop shall see fit; and when any oath, affidavit, or affirmation or solemn declaration is or may be by or in pursuance of the provisions of this act required to be made, such oath, affidavit, or affirmation or solemn declaration shall and may be made either before such archbishop or bishop, or the commissioner or commissioners, or one of them, of such archbishop or bishop respectively, or before some ecclesiastical judge or his surrogate, or before a justice of the peace, or before . . . a master extraordinary in chancery, who are hereby authorized and empowered in all and every of the cases aforesaid, to administer such oath, affidavit and affirmation, or to take such declaration, as the case may be."

**When
exempt from
payment of
tolls.**

Under the General Turnpike Act, 3 Geo. 4, c. 126, s. 32, no toll was to be demanded or taken, by virtue of any act, on any turnpike road, "from any rector, vicar or curate going to or returning from visiting any sick parishioner, or on other his parochial duty within his parish." And it was holden that this provision exempted a curate who, in going to perform duty in a parish, passed through a turnpike gate in another parish, from

payment of toll at such gate; and that a clergyman, who, during the vacancy of the living, was requested by the churchwardens to perform the duty of curate, and was authorized by a letter sent by the bishop's direction, but without licence under the bishop's hand and seal, to perform such duty, was a curate within the above enactment (*d*).

A curate stands in the place of the parson for the purposes of nominating one churchwarden (*e*).

By the Stamp Act (54 & 55 Vict. c. 39), schedule, *tit.* "Licence," a "licence to a stipendiary curate, wherein the annual amount of the stipend is specified," is exempt from all stamp duty.

Curate's
power of
nominating
church-
warden.

Licence
exempt from
duty.

(*d*) *Temple v. Dickinson*, 1 E. & E. p. 34 (1858); vide *infra*, p. 478. (*e*) *Hubbard v. Penrice*, 2 Stra., p. 1245.

CHAPTER XVI.

LECTURERS AND READERS.

THIS chapter relates to :—

1. Lecturers.
2. Readers.

1. *Lecturers.*

Office of
Lecturer.

In London and other cities there are lecturers appointed as assistants to the rectors of churches. They are generally chosen by the vestry or chief inhabitants; and are usually the afternoon preachers. There are also one or more lecturers in most cathedral churches, and many lectureships have likewise been founded by the donation of private persons, as Lady Moyer's at St. Paul's, and many others.

A person holding a lectureship may be suspended for illegal trading, and for the third offence deprived, by s. 31 of 1 & 2 Vict. c. 106, and generally falls under the same restrictions as other "spiritual persons" by that act, and is also subject to 3 & 4 Vict. c. 86.

How ap-
pointed.

It seems generally that the bishop's power is only to judge as to the qualification and fitness of the person, and not as to the right of lectureship: As in *The Churchwardens of St. Bartholomew's Case* (12 Will. 3) (a), one Fishbourne left 25*l.* a year for the maintenance of a weekly lecturer, and appointed that the lecturer should be chosen by the parishioners, and to preach on any day in every week as they should like best. The parishioners fixed on Thursday, and chose a lecturer every year: and now Mr. Turton being lecturer, and the parish having chosen Mr. Rainer, the other would not submit to the choice, whereupon the churchwardens shut Turton out of the church. Afterwards the Bishop of London determined in his favour, and granted an inhibition and monition for that purpose. But by Holt C. J.—A prohibition must go to try the right; it is true a man cannot be a lecturer without a licence from the bishop or archbishop, but their power is only as to the qualification, and fitness of the person, and not as to the right of the

(a) 3 Salk. p. 87, reported as *Rez v. Churchwardens of St. Bartholomew's*, 13 East, p. 421, note.

lectureship; and the ecclesiastical court may punish the churchwardens, if they will not open the church to the person, or to any one acting under him, but not if they refuse to open it to any other.

But in a case where there is no fixed lecturer or ancient salary, but the lectureship is to be supported only by voluntary contributions, and there is not any custom concerning such election, it seems that the ordinary is the proper judge whether or no any lecturer in such place ought to be admitted, as in the case of *The Lecturer of St. Anne's, Westminster* (16 Geo. 2) (b), the Court of King's Bench, upon consideration, refused to grant a mandamus to the Bishop of London to grant a licence to a lecturer, who appeared to have no fixed salary, but to depend altogether upon voluntary contributions, and where there was no custom and the rector had refused his leave to preach in the church to the person now applying.

When the ordinary may interfere.

This doctrine has been recognized in the following cases:—*Rex v. The Bishop of London*, relating to St. Luke, Chelsea (c), and *Rex v. Field, Rector, and others the Churchwardens of the United Parishes of St. Anne, St. Agnes and Zachary* (d). For, per Lord Mansfield, C. J., in the former case—No person can use the pulpit of another unless he consents. But if there has been an immemorial usage, the law supposes a good foundation for it; and if the lectureship be endowed, that affords a strong argument to support the custom. . . . And, per Lord Kenyon, C. J., in the latter case—The right of the lecturer in such case partially supersedes the right of the rector (e).

In *Rex v. The Bishop of Exeter* (f), it appeared that John Dodderidge had by his will devised a rent-charge of 50*l.* per annum, payable out of the impropriate rectory of Fremington, for the use of a lecturer within the said parish for ever. The lectures had been read in the parish church, and the annual stipend had been regularly paid to the several lecturers from his death to that of the last lecturer. The lectureship was founded in 1658, consequently there could be no immemorial usage; and as the episcopal constitution was at that time suspended, there could be no assent of the bishop, rector and vicar to the endowment. The Court of King's Bench therefore refused a mandamus to the bishop to license a lecturer without the consent of the vicar.

Trustees of a lecture, to be preached at a convenient hour, may appoint any hour they please, and vary their appointment (g). As to the right of and qualification for voting in the nomination of a lecturer, the usage of the parish is, according to Lord Hardwicke, if consistent with the deed of trust, a safe

Times of lecture may be fixed.

(b) 2 Stra. p. 1192; *S. C.* nom. *Rex v. Bp. of London*, 1 Wils. p. 11.

(c) 1 T. R. p. 331.

(d) 4 T. R. p. 125.

(e) See, however, *Dixon v. Metcalfe*, 2 Eden, p. 360.

(f) 2 East, p. 462.

(g) *Rex v. Bathurst*, 1 Black. W. p. 209.

criterion (*h*). But it is always to be borne in mind, as laid down by Dr. Swabey in *Clinton v. Hatchard* (*i*), that no person can be a lecturer, although elected by the parishioners, without the rector's consent, unless there be an immemorial custom to such effect (*k*).

In *Rex v. Jacob*, Romain obtained a rule to show cause why a mandamus should not be granted, to restore him to the lectureship of D. (St. Dunstan's?). On showing cause, it appeared that the trustees of the founder of the lectureship. appointed him to preach at seven in the afternoon, but he would only preach immediately after service; and it appearing that the hour had before been varied, the court discharged the rule, with costs; because the above circumstances had not been disclosed when the motion was originally made (*l*).

Canons
36 and 37.

Canons 36 and 37 of 1865 expressly apply to lecturers and readers of divinity. So did the former canons of 1603 (*m*).

As to licence.

By 14 Car. 2, c. 4, s. 15, "No person shall be received as a lecturer, or permitted, suffered or allowed to preach as a lecturer, or to preach or read any sermon or lecture in any church, chapel or other place of public worship unless he be first approved and thereunto licensed by the . . . archbishop of the province or bishop of the diocese, or (in case the see be void) by the guardian of the spiritualities, under his seal." "Lecturers" and "preachers" are expressly included under 28 & 29 Vict. c. 122, s. 5 (*n*).

Penalty.

By 14 Car. 2, c. 4, s. 17, If any person who is by this act disabled to preach any lecture or sermon, shall during the time that he shall continue so disabled preach any sermon or lecture, he shall suffer three months' imprisonment in the common gaol (*o*).

Reading of
common
prayers before
sermon or
lecture.

By sect. 18 it is provided, that at all times when any sermon or lecture is to be preached, the common prayers and service in and by the said book appointed to be read for that time of the day, shall be openly, publicly, and solemnly read by some priest or deacon, in the church, chapel, or place of public worship, where the said sermon or lecture is to be preached, before such sermon or lecture be preached, and that the lecturer then to preach shall be present at the reading thereof.

Universities.

By sect. 19, "This act shall not extend to either of the university churches when any sermon or lecture is preached there, as and for the university sermon or lecture; but the same may be preached or read in such sort and manner as the same hath been heretofore preached or read."

These provisions, however, are now qualified by sect. 6 of 35 & 36 Vict. c. 35 (The Act of Uniformity Amendment Act,

(*h*) *Att.-Gen. v. Parker*, 1 Ves. sen. p. 43; 3 Atk. p. 599; see also *Att.-Gen. v. Hewer*, 2 Vern. p. 386; *Att.-Gen. v. Forster*, 10 Ves. p. 342; *Att.-Gen. v. Newcombe*, 14 Ves. p. 7.

(*i*) 1 Add. p. 97.

(*k*) See also *Farnworth v. Bp. of Chester*, 4 B. & C. p. 569.

(*l*) Serjt. Hill's MSS.

(*m*) Vide supra, pp. 249, 352.

(*n*) Vide supra, p. 351.

(*o*) See 15 Car. 2, c. 6, s. 6.

1872), which admits of a lecture being preached without the common prayers being read, so that the lecture be preceded by any service authorized by that act, or by the bidding, prayer, or by a collect with or without the Lord's Prayer (*p*).

In the case of *Rex v. The Archbishop of Canterbury and Bishop of London* (*q*), a mandamus was moved for to compel the bishop, or, in the alternative, the archbishop to license and approve Dr. Povah under the 15th section of 14 Car. 2, c. 4, just set forth. The bishop made affidavit that he conscientiously disapproved; and the court refused the mandamus.

Bishop's power to refuse licence.

The 7 & 8 Vict. c. 59, entitled "An Act for better regulating the Offices of Lecturers and Parish Clerks," after reciting that "in divers districts, parishes, and places there now are or hereafter may be certain lecturers or preachers in the holy orders of deacon or priest of the united church of England . . . elected or otherwise appointed to deliver or preach lectures or sermons only, without the obligation of performing other clerical or ministerial duties": and that "it is expedient in many cases that such lecturers or preachers should be authorized and required to perform other clerical and ministerial duties, and to act, if necessary, as assistant curates, in such districts, parishes, or places," enacts as follows:—

7 & 8 Vict. c. 59.

Sect. 1. "It shall be lawful for the bishop of the diocese wherein any such lecturers or preachers shall be so elected or appointed as aforesaid, if he shall think fit, with the assent of the incumbent of every such district, parish, or place, to require, by writing under his hand and seal, any such lecturer or preacher to undertake and perform such other clerical or ministerial duties, as assistant curate or otherwise, within such district, parish, or place, as the said bishop, with the assent of such incumbent as aforesaid, shall think proper, and also to vary from time to time, if necessary, and with the like assent, the particular duties so required to be performed as aforesaid; and in case such lecturer or preacher shall at any time refuse or neglect duly and faithfully to perform such additional duties, and to act in the manner required by the said bishop as aforesaid, it shall be lawful for the said bishop to summon the said lecturer or preacher to appear before him, and thereupon the said bishop, with the assistance of one at least of the archdeacons and also of the chancellor of such diocese, shall proceed summarily to inquire into the facts of the case, and to adjudicate thereon, and, if necessary, to suspend or remove the said lecturer or preacher from his said office, and to declare the same vacant; but nevertheless such lecturer or preacher may, within fourteen days next after the passing or making of any such sentence or declaration, appeal therefrom to the archbishop of the province, who shall thereupon forthwith summarily hear and determine

Lecturers or preachers may be required to perform other clerical duties in certain cases.

(*p*) Vide infra, Part III., Chap. XI., sect. 9.

has already been referred to at p. 322, supra. See also *Rex v. Bp. of London*, 13 East, p. 419.

(*q*) 15 East, p. 117. This case

the same; and if no such appeal be made within the time aforesaid, or if the said sentence or declaration shall upon such appeal be affirmed by the said archbishop, the said bishop shall then cause the same to be forthwith duly published in the church or chapel wherein the said lecturer or preacher hath been used to deliver or preach his said lectures or sermons by virtue of his said office, and thereupon the said office shall be and be deemed to be vacant, and the parties entitled to elect or appoint a person to the same shall be entitled and required to elect or appoint a successor thereto, in the same manner as if the said lecturer or preacher were dead, and the right and interest of such lecturer or preacher to and in the said office, and to and in all the emoluments and advantages thereof, shall wholly cease and determine." The section ends with saving the rights of the then holders of lectureships.

Power to appoint persons in holy orders to the office of clerk, and to require such persons to act as assistant curates, if necessary.

Sect. 2. "When and so often after the passing of this act as any vacancy shall occur in the office of church clerk, chapel clerk, or parish clerk, in any district, parish or place, it shall be lawful for the rector or other incumbent or other the person or persons entitled for the time being to appoint or elect such church clerk, chapel clerk, or parish clerk as aforesaid, if he shall think fit, to appoint or elect a person in the holy orders of deacon or priest of the United Church of England and Ireland to fill the said office of church clerk, chapel clerk, or parish clerk; and such person so appointed or elected as aforesaid shall, when duly licensed as hereinafter provided, be entitled to have and receive all the profits and emoluments of and belonging to the said office, and shall also be liable in respect thereof, so long as he shall hold the same, to perform all such spiritual and ecclesiastical duties within such district, parish, or place as the said rector or other incumbent, with the sanction of the bishop of the diocese, may from time to time require; but such person in holy orders so appointed or elected as aforesaid shall not by reason of such appointment or election have or acquire any freehold or absolute right to or interest in the said office of church clerk, chapel clerk, or parish clerk, or to or in any of the profits or emoluments thereof, but every such person in holy orders so appointed or elected as aforesaid shall at all times be liable to be suspended or removed from the said office, in the same manner and by the same authority, and for such or the like causes, as those whereby any stipendiary curate may be lawfully suspended or removed; such suspension or removal nevertheless being subject to the same power of appeal to the archbishop of the province to which any stipendiary curate is or may be entitled.

Such person to be licensed by the bishop, and when appointed otherwise than by the

Sect. 3. "Every such appointment or election as last aforesaid, if made by any other person or persons than the rector or other incumbent of such district, parish, or place, shall be subject to the consent and approval of such rector or other incumbent of such district, parish, or place; and no person in holy

orders so appointed or elected as aforesaid shall be competent to perform any of the duties of his said office, or any other spiritual or ecclesiastical duties, within such district, parish, or place, or to receive or take any of the profits or emoluments of his said office, unless and until he shall have duly obtained from the bishop of the diocese within which such district, parish, or place is situate such licence and authority in that behalf as are required and usual in respect of stipendiary curates; but nevertheless such licence and authority, when so obtained as aforesaid, shall entitle the person so obtaining it to hold the said office, and to receive and take the profits and emoluments thereof as aforesaid until he shall have resigned the same, or have been so suspended or removed as aforesaid, without any annual or other re-appointment or re-election thereto."

incumbent to be subject to the approval of the incumbent.

Sect. 4. "No rector or other incumbent of any district, parish, or place wherein any such person or persons shall be so employed as aforesaid, or wherein any lecturer or preacher shall have been required to undertake and perform other clerical and ministerial duties, in the manner hereinbefore provided, or wherein any person in holy orders shall have been appointed or elected to fill the office of church clerk, chapel clerk, or parish clerk as aforesaid, shall by reason of any such provisions be exempt from any duty or obligation of employing within the same district, parish, or place any curate or other assistant to which by any law, statute, canon, or usage he is or may be already liable; but it shall be lawful for the bishop of the diocese from time to time to require every such rector or other incumbent to provide, or for the said bishop to nominate and license, such other curates and assistants to officiate within every such district, parish, or place, in addition either to the person or persons so intended to be employed as aforesaid, or to such lecturer or preacher, or to such church clerk, chapel clerk, or parish clerk, and to make regulations for the payment of the stipends of such other curates and assistants, as fully and in the same manner and subject to the same restrictions as he might have done by law if this act had not been passed."

Appointments of assistant clergy under this act not to exempt incumbents from the duty of providing curates in cases where they are now liable.

By 23 & 24 Vict. c. 142, s. 26, where churches are united under that act, and there has been an endowed lectureship, or lectures have been customarily preached in a church which is taken down, or ceases to be a parish church, the bishop may prepare a scheme for transferring such lecture to another church (*q*).

Transfer of lecture.

By 54 & 55 Vict. c. 24, s. 5, the salary formerly granted to a preacher at the Rolls is taken away.

By the Stamp Act (54 & 55 Vict. c. 39), schedule, *tit.* "Licence," the duty for a "licence under the seal of any arch-Stamp duty.

(*q*) Vide *supra*, pp. 410, 414; et vide 18 & 19 Vict. c. 127, s. 12, at p. 403.

bishop, bishop, chancellor, or other ordinary, or by any ecclesiastical court in England,

“(1) To hold the office of lecturer, reader, chaplain, church clerk, parish clerk or sexton,” is fixed at 10s.

But a “(3) licence for the purpose of authorizing or enabling any person to preach or exercise any other spiritual function, not being a licence to hold the office of lecturer, reader, or chaplain, and there being no salary or emolument for or attached to the exercise of the function for which such licence is granted,” is exempt from all duty.

2. *Readers.*

Office of
reader.

The office of reader is one of the five inferior orders in the Roman church.

And in this kingdom, in churches or chapels where there is only a very small endowment, and no clergyman will take upon him the charge or cure thereof, it has been usual to admit readers, to the end that divine service in such places might not altogether be neglected.

It is said, that readers were first appointed in the church about the third century. In the Greek church they were said to have been ordained by the imposition of hands: but whether this was the practice of all the Greek churches has been much questioned. In the Latin church it was certainly otherwise. The council of Carthage speaks of no other ceremony, but the bishop's putting the Bible into his hands in the presence of the people, with these words, “Take this book, and be thou a reader of the word of God, which office if thou shalt faithfully and profitably perform, thou shalt have part with those that minister in the word of God.” And in Cyprian's time they seem not to have had so much of the ceremony as delivering the Bible to them, but were made readers by the bishop's commission and deputation only, to such a station in the church (*r*).

Injunctions to
be subscribed.

Upon the reformation here, readers and deacons were required to subscribe to the following injunctions:—

“Imprimis, I shall not preach nor interpret, but only read that which is appointed by public authority:

“I shall read divine service plainly, distinctly, and audibly, that all the people may hear and understand:

“I shall not minister the sacraments or other public rites of the church, but bury the dead, and purify women after their childbirth:

“I shall keep the register book according to the Injunctions:

“I shall use sobriety in apparel, and especially in the church at common prayer:

“I shall move men to quiet and concord, and not give them cause of offence:

“I shall bring in to my ordinary, testimony of my behaviour from the honest of the parish where I dwell, within one half-year next following:

(*r*) Bingham, Orig. Eccl., vol. i. p. 376.

"I shall give place upon convenient warning so thought by the ordinary, if any learned minister shall be placed there at the suit of the patron of the parish :

"I shall claim no more of the fruits sequestered of such cure where I shall serve, but as it shall be thought meet to the wisdom of the ordinary :

"I shall daily at the least read one chapter of the Old Testament and one other of the New, with good advisement, to the increase of my knowledge :

"I shall not appoint in my room, by reason of my absence or sickness, any other man ; but shall leave it to the suit of the parish to the ordinary, for assigning some other able man :

"I shall not read but in poorer parishes destitute of incumbents, except in the time of sickness, or for other good considerations to be allowed by the ordinary :

"I shall not openly intermeddle with any artificers' occupations, as covetously to seek a gain thereby ; having in ecclesiastical living the sum of twenty nobles or above by year."

This was resolved to be put to all readers and deacons by the respective bishops, and is signed by both the archbishops, together with the Bishops of London, Winchester, Ely, Sarum, Carlisle, Chester, Exeter, Bath and Wells and Gloucester (s).

By the foundation of divers hospitals, there are to be readers In hospitals.
of prayers there, who are usually licensed by the bishop.

The rector of St. Ann's, by certificate to the bishop, appointed When an
ecclesiastical
preferment.
Martyn curate of his parish, with a salary of fifty guineas, until he should be otherwise provided of some ecclesiastical preferment. Martyn was afterwards appointed to the readership of the parish, for which he had 30*l.* by order and at the will of the vestry. It was the opinion of Lord Mansfield and the Court of King's Bench, that this readership was not an ecclesiastical preferment within the meaning of the certificate (t).

A readership is not included under the definition of benefice Recent
statutes.
given by 1 & 2 Vict. c. 106, s. 124, and 2 & 3 Vict. c. 49, s. 21. It is however expressly included under 3 & 4 Vict. c. 86.

Recently lay readers have been appointed by bishops in Lay readers.
several dioceses to officiate with consent of the incumbent. They will be mentioned later (u).

(s) Strype, *Annals*, vol. i. p. 514.

(t) *Martyn v. Hind*, Cowp. p. 437.

See also *Rex v. Bp. of Peterborough*,

4 D. & R. p. 720 ; 3 B. & C. p. 47.

(u) Vide *infra*, Part VI., Chap.

VII.

CHAPTER XVII.

CHAPLAINS.

- SECT. 1.—*Chaplains of Privileged Persons—of Parliament—of the Queen.*
 2.—*Chaplains in the Army and Navy.*
 3.—*Chaplains to Gaols, Workhouses, Lunatic Asyls and Cemeteries.*

Kinds of
chaplains.

In this division of the subject the law as to the ecclesiastical persons designated as chaplains is treated of. They are, as it will be seen, of various kinds (*a*).

SECT. 1.—*Chaplains of Privileged Persons and of the Queen.*

Subject of
section.

In this section the former law as to chaplains to certain privileged persons is considered, and also the present status and legal position of her Majesty's chaplains.

Chaplains by
21 H. 8, c. 13.

By the statute of 21 Hen. 8, c. 13, ss. 13—21, it was provided "that all spiritual men now being or which hereafter shall be of the king's council, may purchase licence or dispensation and take, receive and keep three parsonages or benefices with cure of souls; and that all other being the king's chaplains, and not sworn of his council, the chaplains of the queen, prince or princess, or any of the king's children, brethren, sisters, uncles or aunts, may semblably purchase licence or dispensation, and retain and keep two parsonages and benefices with cure of souls; every archbishop and duke may have six chaplains; every marquis and earl, five; viscount, and other bishop, four; chancellor of England for the time being, baron and knight of the garter, three; every duchess, marchioness, countess and baroness, being widows, two; treasurer, comptroller of the king's house, the king's secretary, and dean of his chapel, the king's amner, and master of the rolls, two; chief-justice of the King's Bench, one; warden of the five ports, one; whereof every one may purchase licence or dispensation, and receive, have and keep two parsonages or benefices with cure of souls."

(*a*) Chaplains to Consuls are treated of in Part X., Chap. V.

Every Duke, Marquis, Earl, &c.]—And although such duke, marquis, earl, or the like, be minors, and under age, yet they might retain chaplains within this act; as was adjudged in the case of *The Queen v. The Bishop of Salisbury*, even though the lord admiral in whose custody the minor was, might retain chaplains in his own right (b).

But if the son and heir apparent of a baron, or such like, retained a chaplain, and his father died, and the chaplain purchased dispensation, such retainer would not avail, because it was not available at the beginning (c).

And if the person who retained died, or was removed, or was attainted, before any effect of the retainer, it was gone, and should have no effect afterwards; but if it had taken effect before, it continued good, notwithstanding death or attainder, or removal (d).

Sect. 22. "Provided always, that the said chaplains so purchasing, taking, receiving and keeping benefices with cure of souls, as is aforesaid, shall be bound to have and exhibit, where need shall be, letters under the sign and seal (e) of the king or other their lord and master, testifying whose chaplains they be; and else not to enjoy any such plurality of benefices by being such chaplain, anything in this act notwithstanding."

Letters under the Sign and Seal (e).]—Which might be in this form:—

"Know all men by these presents, that I, the Right Honourable A. Lord —, Baron of —, have admitted, constituted and appointed the reverend B. C., clerk, my domestic chaplain, to have, hold and enjoy all and singular the benefits, privileges, liberties, and advantages, due and of right granted to the chaplains of noblemen by the laws and statutes of this realm. Given under my hand and seal, the — day of —, in the year," &c.

Form of appointment.

And the same being under hand and seal, it seems that if there should have been lawful cause to discharge him, such discharge must have been also under hand and seal: which might be to this effect:—

"Whereas I, the Right Honourable A., Lord —, Baron of —, by writing under my hand and seal, bearing date the — day of —, did admit, constitute and appoint B. C., clerk, my domestic chaplain; to hold and enjoy all benefits, privileges and advantages belonging to the same: Now by these presents, I, the said A., Lord —, do for divers good and lawful causes and considerations, dismiss and discharge the said B. C. from my service as domestic chaplain, and from all privileges and advantages to him granted as aforesaid. Given under my hand and seal, the — day of —, in the year," &c.

Form of discharge.

(b) *Acton's case*, 4 Co. p. 119; *Gibs.* p. 908.

(c) *Drury's case*, 4 Co. p. 90 b.

(d) *Gibs.* p. 908.

(e) As to these words, see *Whetstone v. Hickford*, Cro. Eliz. p. 424; *S.C. nomine Whetstone v. Hickford*, Savile, p. 135; *The Queen and Savacre's case*, Godb. p. 41.

Additions to
number
ordinarily
allowed.

Sect. 24. "Provided also that every archbishop, because he must occupy eight chaplains at consecration of bishops; and every bishop, because he must occupy six chaplains at giving of orders and consecration of churches, may every of them have two chaplains over and above the number above limited unto them, whereof every one may purchase licence or dispensation, and take, receive and keep as many parsonages and benefices with cure of souls, as is before assigned to such chaplains."

Sect. 25. "Provided also . . . that no person or persons to whom any number of chaplains or any chaplain, by any of the provisions aforesaid is limited, shall in anywise, by colour of any of the same provisions, advance any spiritual person or persons, above the number to them appointed, to receive or keep any more benefices with cure of souls than is above limited by this act, any thing specified in the said provisions notwithstanding; and if they do, then every such spiritual person and persons, so advanced above the said number, to incur the penalty contained in this act."

Above the Number.]—Although a chaplain retained above the number be promoted before those who were duly retained according to the statute, such retainer (above the number) should neither avail him, nor divest those who were duly retained of the right of purchasing dispensation; nor should he ever have benefit by his retainer (even though the rest were dead) unless it were renewed upon the death of one of those who made up the statutable number: inasmuch as the retainer was null *ab initio*; and a chaplain once legally qualified cannot be discharged at pleasure, to make way for others (*f*).

So if a baron (who could have but three chaplains) did qualify three accordingly, and they being advanced to pluralities, he upon displeasure or for other cause did dismiss them from their attendance, yet they were his chaplains at large, and might hold their pluralities for their lives; and though he might entertain as many others as he will, yet he could not qualify any of them to hold a plurality, whilst the first three were living. And so of others. But as any of the first three died, he might qualify others, if so be he retained them anew after the death of the first (*g*).

If a baron, who might retain three chaplains as aforesaid, were made warden of the cinque ports (who might have a chaplain in respect of his office), yet should he have but three; and if a baron had three, and were made an earl, yet he should have but five in all; and so of the rest; because the statute was to be taken strictly against pluralities (*h*).

Sect. 29. "Provided also, that it shall be lawful to every spiritual . . . persons being chaplains to the king . . . to whom it shall please his highness to give any benefices or promotions

(*f*) Gibs. p. 909.

(*g*) Wats. c. 3, p. 15.

(*h*) Gibs. p. 909.

spiritual, to what number soever it be, to accept and take the same without incurring the danger, penalty and forfeiture in this statute comprised."

Being Chaplains to the King.—It has been resolved in the Court of King's Bench, that a chaplain extraordinary was not a chaplain within this statute, but only the chaplains in ordinary; that is, not one who has only an entry of his name made in the book of chaplains, but one who has also a waiting time (i).

Sect. 33. "Provided always, that every duchess, marquiss, countess, baroness, widows, which have taken or that hereafter shall take any husbands under the degree of a baron, may take such number of chaplains as is above limited to them being widows, and that every such chaplain may purchase licence to have and take such number of benefices with cure of souls, in manner and form as they might have done if their said ladies and mistresses had kept themselves widows." Peeresses
re-marrying

Being Widows.—And though they married, the retainer before marriage stood good, and should have its effect after marriage. If they married under the degree of a baron, they were specially provided for in this clause; and if they married a baron, or above that degree, my Lord Coke has laid down the law in the following words: "If a woman baroness widow retains two chaplains according to the statute, and afterwards taketh one of the nobility to husband, and afterwards the husband dies, the retainer of these two chaplains remains, and they without new retainer may take two benefices, for their retainer was not determined by the marriage" (k).

The act of Henry the Eighth, as well as certain other acts, was in great measure repealed by 57 Geo. 3, c. 99; but sect. 10 of that act enacted, that "No chaplain of the king's or queen's most excellent majesty or of any of the king's or queen's children, brethren or sisters, during so long as he shall actually attend in the discharge of his duty as such chaplain in the household to which he shall belong; and no chaplain of any archbishop or bishop, or of any temporal lord of parliament, or of any other person or persons authorized by law to appoint any chaplain or chaplains, during so long as such chaplain or chaplains shall abide and dwell and daily attend in the actual performance of his duty as such chaplain in the household to which he shall so belong; and no spiritual person actually serving as a chaplain of the House of Commons or as clerk of his majesty's closet, or as a deputy clerk thereof, or a clerk of the closet of the heir apparent, or as a deputy clerk thereof, or as a chaplain-general of his majesty's forces by sea or land, or chaplain of his majesty's dockyards, while such spiritual person shall be actually attending and performing the duties of such

(i) *Gibs.* p. 909; *Brown v. Mugg*, 1 Salk. p. 162; *S. C.*, 2 Ld. Raym. p. 791. (k) *Acton's case*, 4 Co. p. 119; *Gibs.* p. 909.

office respectively; or as a chaplain in the household of any British ambassador residing abroad, during the time of his performing the duties of such his office . . . shall be liable to any of the pains, penalties or forfeitures in this act contained, for or on account of any non-residence."

Uncertain
status under
present law.

But 1 & 2 Vict. c. 106 repeals both this statute and that of Henry the Eighth altogether, and the question as to the chaplains of privileged persons would now seem to depend upon the common law alone; and it is, to say the least, uncertain whether the peculiar status of such chaplains is in any way recognized by the existing law.

With respect to the chaplains of her Majesty—

Royal
chaplains.

The royal chaplains used to be forty-eight in number, and waited in rotation at St. James', four at a time throughout the months of the year. A table was provided for them in the palace.

In the year 1805, it was arranged that they should receive 30*l.* per annum in lieu of their board, and either then or subsequently their waits were changed from four to one at a time; double waits, *i.e.*, two consecutive Sundays served by the same chaplains, providing for months with five Sundays.

In 1860, it was ordered that the number should be reduced as vacancies fell in to thirty-six, a reduction which is now completed. Three wait in succession each month, the first Sunday being assigned to the sub-dean.

It was also provided in 1860, that her Majesty should have the power of nominating honorary chaplains to the number of twelve. These pass into the full or paid list as vacancies occur in that. Till then, they have no stated wait, but are liable to be summoned to St. James' on the fifth Sunday of any month which has five Sundays, as well as on other occasions.

Priests in
ordinary.

The priests in ordinary are a different body from the chaplains. They are appointed by warrant.

Privilege of
priest in
ordinary.

A priest in ordinary to the sovereign is privileged from arrest, either on mesne or final process; this has been holden in several cases (*l*). It does not matter that he was appointed by one sovereign, and not on the death of that sovereign re-appointed by his successor, if he receives his salary as a priest in ordinary and is borne on the books of the household (*m*).

A priest in ordinary is further privileged from arrest on process of the county court, under 8 & 9 Vict. c. 95, s. 99, for non-attendance on a judgment summons—such process being in the nature of execution, and not merely process of contempt.

The proper mode of obtaining his discharge in such case, is, not by writ of privilege, but by *habeas corpus* from one of the

(*l*) *Byrn v. Dibdin*, 1 C. M. & R. p. 821; *Winter v. Dibdin*, 13 M. & W. p. 25. (*m*) *Harvey v. Dakins*, 3 Ex. p. 266.

superior courts (upon affidavits showing his privilege), or by application to the judge of the county court (*n*).

As to chaplains to the House of Commons (*o*)—

Before the Long Parliament, prayers were read by the clerk and sometimes by the Speaker. In the Long Parliament, ministers were first appointed "to pray with the House, daily." Chaplains to the House of Commons.

After the Restoration, the Speaker appointed a chaplain, who read prayers daily at the meeting of the House. He was appointed for the Parliament only; and was usually rewarded by an address to the crown praying for some church preferment, generally a prebendal stall.

Immediately after the Reform Act (in 1833), this latter custom was departed from, and the chaplain was paid by an annual salary of 400*l.* a-year.

Sometimes the chaplain is desired to preach before the House; and on other occasions different clergymen are appointed. It was formerly the rule that no clergyman under the degree of a doctor of divinity should be desired to preach, but in the time of the Speaker Shaw Lefevre it was departed from in favour of a bachelor of divinity.

Whenever the chaplain is accidentally absent, and his place is not supplied by another clergyman, the speaker reads prayers.

In the House of Lords it is the duty of one of the junior bishops to read prayers; or, in their absence, some other bishop, or a peer in holy orders performs this office. Prayers in the House of Lords.

Prayers are read in the House of Lords before the House sits in the morning for the purpose of hearing appeals.

SECT. 2.—*Chaplains in the Army and Navy.*

In this section the status of military and naval chaplains is discussed—and, first, as to chaplains in the army. Subject of section.

Our Prayer Book (*p*) contains no special service or prayers for the use of the army, as it does for the navy. Army.

This distinction is due to the constitutional jealousy of a standing army, which has been so marked a feature of our free country, and to the period (1662) when the special prayers for the navy were first introduced into our Prayer Book. The No special service for the army.

(*n*) *Ex parte Dakins, In re Swan v. Dakins*, 16 C. B. p. 77.

(*o*) Sir T. Erskine May, *Parliamentary Practice*, 6th ed. p. 187, note 1; General Index to the Journals of the House of Commons, 1547—1714, p. 550, xiii.; House appoints preachers—goes to church, prayers, &c., p. 1019; Orders and

resolutions relative to the Speaker—"Chaplain," p. 70. See also Commons Journals, vol. vii. p. 424.

(*p*) *Military Forces of the Crown*, C. M. Clode, vol. ii. p. 366, c. 28, The Chaplain-General's Department. This chapter contains a full and elaborate dissertation on military chaplains.

Articles of War, however, of this date ordered the chaplain of the army, as the rubric ordered the chaplain of the navy, to read the morning and evening service daily to the soldiers.

This order was afterwards confined to Sundays and public festivals and fasts.

Chaplains
to forts and
garrisons.

In former times chaplains were appointed to various forts and garrisons, and at this day the chaplain of the Tower of London discharges the duties of a parochial minister to the garrison.

Garrison chaplains generally have been abolished, and staff chaplains are now appointed by the archbishops of the provinces and the Bishop of London.

Principal
chaplain.

In 1844 a principal chaplain was appointed, and his duties were thus indicated by his letter of service:—

Duties as de-
fined by letter
of service.
First appoint-
ments and
promotions of
chaplains.

“In the first place, he was to procure for the Archbishops of Canterbury and York and the Bishop of London such testimonials as they might require, with a view to the nomination of persons appointed for the first time to be Chaplains to the Forces, and to take their directions upon all points which they might deem necessary to be attended to in the consideration of the several cases brought under their notice. Then he was to communicate with the Secretary at War on all points relating to the promotion, exchange, increase of salary, or any fresh disposal of the services of a clergyman whose first nomination had previously been sanctioned, before any such fresh nomination or succession be made, in order that the necessity for continuing the appointments or increasing the salary might first of all be decided upon by the Secretary at War.”

General su-
perintendence
of religious
worship.

“He was to adopt measures for becoming acquainted with the mode in which divine service was performed to the troops at home and in the colonies, and to suggest from time to time such arrangements as might appear to him to be desirable, with a view to the Spiritual Welfare of the Forces at all Stations; exercising a general superintendence in all matters having reference to the spiritual instruction of the troops, and the provision of religious books for their use.”

Select clergy-
men for duty.

“Whenever the churches at any place in Great Britain and Ireland, in which troops were stationed for any length of time, did not afford sufficient accommodation for them, and it became necessary for the first time to provide for the performance of divine service or for attendance on the sick in hospital, the Principal Chaplain was required to ascertain, for the Secretary at War's information, that the officiating clergyman proposed was properly qualified, and if approved, he was to explain the duties to be performed before authorizing him to commence his functions. He was warned to exercise great caution and discretion in his recommendation of candidates, because of the different sects of which a regiment in her Majesty's service is generally composed.”

Visitation of
the sick in
hospital.

“The concluding paragraph of his instructions was expressed in these words:—‘As I attach great importance to the duties of

visiting the sick in hospital, and the supervision of the schools which have been established for the education of the children of the Soldiers, I shall be prepared to receive and consider any suggestion which you may be enabled to submit in respect to these points: and it being essential that these duties should be performed with a due regard to regularity as well as discipline, it might be expedient that the periodical visits should be recorded in a register to be established for that specific purpose.”

“In July, 1846, the title of Chaplain-General was revived, and the appointment conferred upon the Rev. George Robert Gleig, M.A., under commission, and a letter of service directing him to follow the instructions of April, 1844. The emolument of the office was also increased, for reasons thus forcibly set forth by Lord Herbert:—‘The chaplain-general is at the head of a vast number of clergy ministering both at home and abroad to the spiritual wants of the troops, and the office is in the nature of an archdeaconry, with a jurisdiction far more extensive than any that attaches to that office in England’” (*q*).

Office of chaplain-general revived.

It is well worthy of consideration whether the office of chaplain-general should not be holden by a suffragan bishop.

Might be a suffragan bishop.

The pay, retirement, and promotion of chaplains, and the pay of the chaplain-general, are now regulated by the provisions of a royal warrant dated 10th June, 1884.

Warrant of 1884.

The relations of the chaplains to the bishop of the diocese and the incumbent of the parish were uncertain and anomalous till the passing, in 1868 (*r*), of 31 & 32 Vict. c. 83. The preamble recites, “Whereas it would conduce to the well-being of her Majesty’s army if greater facilities were afforded for the ministrations of army chaplains within the stations to which such chaplains are appointed, and if more particular provision were made for the superintendence of army chaplains officiating in chapels or places set apart or used for divine worship according to the rites and ceremonies of the united church of England and Ireland.” Then come the following enactments:—

The Army Chaplains’ Act, 1868.

Sect. 2. “For the purposes of this act the term ‘army chaplain’ shall mean a commissioned chaplain to her Majesty’s military forces in holy orders of the said church; and the term ‘station’ shall mean and include any camp, barrack, hospital or arsenal, and property adjacent thereto, the site whereof is held by or in trust for her Majesty.”

Interpretation of terms.

Sect. 4. “It shall be lawful for the Queen’s most excellent Majesty in Council, upon the recommendation of one of her Majesty’s Principal Secretaries of State, at any time after the

Power to her Majesty, with consent, &c., to set out

(*q*) Military Forces of the Crown, C. M. Clode, vol. ii. pp. 383—4, c. 28.

(*r*) The ecclesiastical court in Dublin, in 1867, prohibited the chaplain from performing divine

service or administering the sacrament in Richmond barracks. Military Forces of the Crown, C. M. Clode, vol. ii. p. 386, c. 28; *ibid.*, vol. i., Appendix, p. 751, cxlvi.

precinct, and declare the same to be an extra-parochial district.

passing of this act, with the consent under the hand and seal of the bishop of the diocese within which such station shall be locally situate, to set out by metes and bounds, the precinct thereof, and to declare the same for the purposes of this act to be an extra-parochial district: Provided always, that a copy of the draft of any scheme for constituting any such precinct or district proposed to be laid before her Majesty in Council shall be delivered or transmitted to the incumbent and to the patron or patrons of the church or chapel of any parish, chapelry or district out of which it is recommended that any such precinct or district, or any part thereof, should be taken, in order that such incumbent, patron or patrons, may have an opportunity of offering or making to one of her Majesty's Principal Secretaries of State or to the said bishop any observations or objections upon or to the constitution of such precinct or district; and such scheme shall not be laid before her Majesty in Council until after the expiration of one month next after such copy shall have been so delivered or transmitted, unless such incumbent and patron or patrons shall in the meantime consent to the same; and upon such scheme having been ratified by her Majesty in Council, such precinct or district shall thereafter for all ecclesiastical purposes be and be adjudged and taken to be an extra-parochial place."

Map describing metes and bounds shall be annexed to scheme and registered.

Sect. 5. "A map or plan, setting forth and describing such metes and bounds, shall be annexed to the scheme for constituting any such precinct or district, and shall be transmitted therewith to her Majesty in Council, and a copy thereof shall be registered by the registrar of the diocese, together with any order issued by her Majesty in Council for ratifying such scheme: provided always, that it shall not be necessary to publish any such map or plan in the 'London Gazette.'"

Power to secretary of state to appoint any army chaplain to perform functions in extra-parochial district.

Sect. 6. "It shall be lawful for one of her Majesty's Principal Secretaries of State to appoint from time to time any army chaplain to perform the functions of an army chaplain in any such extra-parochial district, and thereupon it shall be lawful for any such chaplain to officiate therein; and such chaplain during the continuance of his appointment shall for all ecclesiastical purposes be and be adjudged and taken to be, the chaplain of an extra-parochial place within the provisions of this act."

Chapel erected and consecrated in extra-parochial district to be the chapel thereof.

Sect. 7. "Where a chapel has been or shall be hereafter erected within the said extra-parochial district, and consecrated for the performance therein of divine service according to the rites and ceremonies of the said United Church, such chapel shall be for the purposes of this act the chapel of the said extra-parochial district, and shall for all ecclesiastical purposes be, and be adjudged and taken to be, an extra-parochial chapel."

Where building certified to bishop, secretary of state may

Sect. 8. "Where a building shall have been certified under the hand of one of her Majesty's Principal Secretaries of State, to the bishop of the diocese within which such building is locally situate, as used or intended to be used by her Majesty's military

forces as an unconsecrated chapel for the purpose of divine worship according to the rites and ceremonies of the said United Church, it shall be lawful for one of her Majesty's Principal Secretaries of State from time to time to appoint any army chaplain to perform all the functions of an army chaplain therein; and if at any time such building shall cease to be used for the purpose aforesaid, it shall be lawful for one of her Majesty's Principal Secretaries of State to certify such fact to the said bishop, and thereupon the provisions of this act shall no longer apply to such building."

appoint a chaplain to officiate therein.

Sect. 9. "It shall be lawful for the Queen's most excellent Majesty in Council, upon the recommendation of one of her Majesty's Principal Secretaries of State, at any time after the passing of this act to declare all or any of the extra-parochial districts set out under the provisions of this act to be under the exclusive jurisdiction of such archbishop or bishop of the said United Church as may be named in such Order during such time as her Majesty shall see fit, and thereupon it shall be lawful for such archbishop or bishop to exercise over any army chaplain appointed to officiate within any such extra-parochial district all the powers and authority which he is by law authorized to exercise over any clerk in holy orders of the said United Church holding any preferment within his diocese: Provided always, that the previous consent in writing of the said archbishop or bishop named therein shall be obtained before the making of such Order, and further that after the making of such Order, and until the revocation thereof, all other ecclesiastical jurisdiction in respect of the extra-parochial districts named in such order shall wholly cease."

Power to declare extra-parochial districts to be under jurisdiction of archbishop or bishop named in order.

The Roman and Presbyterian chaplains are placed on an equality with those of the Church of England by various recent regulations (s).

Roman and Presbyterian chaplains.

The present Articles of War contain the following provisions on the subject of chaplains:—

31. "Any officer or soldier who, not having just impediment, shall not attend divine service in the place appointed for the assembling of the corps to which he belongs; or who being present, shall behave indecently or irreverently; or who shall offer violence to a chaplain of the army, or to any other minister of God's word, shall be liable, if an officer, to such punishment as by a general court-martial shall be awarded; and if a soldier, to such punishment as by a general, district or garrison court-martial shall be awarded."

Articles of War, 1871.

33. "Any commissioned chaplain who shall absent himself from his duty (excepting in case of sickness or leave of absence) shall be brought before a general court-martial and punished as the circumstances of his offence may require."

34. "Any commissioned chaplain who shall be guilty of

(s) Military Forces of the Crown, C. M. Clode, vol. ii. p. 385.

misconduct, or vicious behaviour derogating from the sacred character with which he is invested, shall, on conviction before a general court-martial, be discharged from his office."

Naval
chaplains.

Form of
prayer to be
used at sea.

Secondly, as to chaplains in the navy:—

In 1662 "Forms of Prayer to be used at Sea" were incorporated into our Prayer Book. The rubrics to this service prescribe that "the morning and evening service to be used daily at sea shall be the same which is appointed in the Book of Common Prayer." To this service certain prayers are added, which "are to be also used in her Majesty's navy every day;" also, "Prayers to be used in Storms at Sea;" also, "The Prayer to be said before a Fight at Sea against any Enemy;" also, other "special" and "short prayers;" also, "When there shall be imminent danger as many as can be spared from necessary service in the ship shall be called together and make a humble confession of their sin to God; in which every one ought seriously to reflect upon those particular sins of which his conscience shall accuse him, saying as followeth" (The Confession); and when that has been said, "then shall the priest, if there be any in the ship, pronounce this absolution." There is also provided "A Thanksgiving after a Storm," and "An Hymn of Praise and Thanksgiving after a dangerous Tempest;" also, "After Victory or Deliverance from an Enemy—A Psalm or Hymn of Praise and Thanksgiving after Victory." For the burial of the dead at sea the office of the Common Prayer Book may be used; only instead of these words—"we therefore commit his body to the ground, earth to earth," &c., a particular form beginning, "we therefore commit his body to the deep," is substituted (*t*).

Government
of chaplains
in the navy.

Chaplains of the navy are governed by "The Queen's regulations and the Admiralty instructions for the government of her Majesty's naval service."

According to these regulations and instructions as revised in 1879, chaplains and naval instructors shall be admitted into her Majesty's naval service by the lords commissioners of the admiralty under such regulations as may from time to time be established; and shall be nominated by commission (Chap. IV., sect. i., arts. 193, 198).

The qualifications for the office of chaplain are that the candidate shall have been ordained deacon and priest of the Church of England, or have been admitted to the same holy orders by the lawful authority of one of the churches within the realm of

(*t*) "Forms of Prayer to be used at Sea, which were first added at the last review, but not designed for a complete office, nor comprised in any regular method; but are all of them, except the two first, which are daily 'to be used in his Majesty's navy,' occasional forms, to be used as

the circumstances of their affairs require; and are so very well adapted to their several occasions, that any one who observes them will see their suitableness without any illustration." Wheatly on the Book of Common Prayer, p. 436.

Great Britain and Ireland which are in communion with the Church of England; that his age does not exceed thirty-five years; that he holds no benefice with a cure of souls. He must produce testimonials from the bishop of the diocese in which he was last licensed, addressed to the admiralty, and must have been examined by some competent person appointed for that purpose by the admiralty, who shall have reported him to be in every respect a fit and proper person to fill the office of chaplain with respectability and advantage to her Majesty's service. Clergymen in priest's orders will be allowed to take temporary service in the navy without any restriction as to age, and will be appointed acting chaplains for temporary service. Whilst so employed they will occupy the same position, enjoy the same privileges as ordinary chaplains; but they will not be entitled to half pay or any other advantages at the termination of their temporary service (*u*).

Chaplains shall not hold any naval rank, but shall retain when afloat the position to which their office would entitle them on shore; and the Chaplain of Greenwich Hospital shall be considered the head of the chaplains with the title of Chaplain of the Fleet.

Chaplains are often appointed naval instructors (see Chap. IV., sect. i., art. 198).

When borne on the books of a ship in commission they are subject to the Naval Discipline Act (29 & 30 Vict. c. 109, s. 87).

In every ship in which there is a chaplain the captain is to be careful that the respect due to his sacred office be shown him by all the officers and men, and that divine service, according to the Liturgy of the Church of England, be performed, and a sermon preached, every Sunday subject to the directions of the senior officer present, and if the duties of the ship or the state of the weather do not absolutely prevent it, at which he, and such of the officers and ship's company, as are not required to be absent on ship's duty, are to be permitted to attend; and he is not to employ the ship's company on Sunday in any other works than those which the public service shall absolutely require. Every week-day, after morning quarters or divisions, short prayers, from the Liturgy of the Church of England, are to be read (Chap. XXII., sect. i., arts. 622, 623).

It being a matter of great importance that nothing should be required of a chaplain which would interfere with his being looked upon as the friend and adviser of every one in the ship, he is not to be required to perform any executive duties in connection with his duty as chaplain.

The Instructions for Chaplains are contained in Chap. XVIII., arts. 568—579. They contain provisions for his giving religious instruction, procuring religious and school books, having the personal custody of the holy communion vessels, celebrating the holy communion, and visiting the sick.

(*u*) Art. 240.

Orders in
council.

Orders in council for regulating the pay, half-pay, and pensions of chaplains were made on March 4, 1812; March 4, 1813; Sept. 24, 1814; Nov. 23, 1815; April 6, 1820; May 13, 1859; Feb. 22, 1860; and Aug. 3, 1867. The qualifications requisite for the appointment of a chaplain are set forth in an order in council of July 31, 1835 (*x*). Further provisions for the retirement of chaplains have been made by orders in council of Feb. 22, 1870, and Feb. 5, 1872. By the order in council of Feb. 22, 1870, the active list of chaplains is to be reduced to 100. There is an order in council of Oct. 23, 1876, as to the Chaplain of the Fleet.

Form of
appointment.

The form of appointment of a naval chaplain is as follows:—

“By the Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

“To Rev. A. B., hereby appointed Chaplain
in her Majesty’s fleet.

“We do, by virtue of the power and authority to us given, hereby constitute and appoint you chaplain in her Majesty’s fleet, authorizing and requiring you from time to time to repair on board and to take charge as chaplain in any ship or vessel to which you may hereafter at any time be duly appointed, and you are properly to officiate in all things relative to the duty of your station, strictly observing and executing the printed regulations and instructions relative to your department, and being obedient to such commands as you shall from time to time receive from your captain or other your superior officers. And for so doing this shall be your commission.

“Given under our hands and the seal of the office of Admiralty this day of 18 , in the year
of her Majesty’s reign. “S. C. DACRES,

“By command of their Lordships.

“CAMPERDOWN.

“V. L.,

“Seniority .”



SECT. 3.—*Chaplains to Gaols, Workhouse, Lunatic Asyls and Cemeteries.*

Gaol
chaplains.

First, as to chaplains to gaols. These are governed by the Prison Acts, 1865 and 1877. By the Prison Act, 1865 (28 & 29 Vict. c. 126), the following provisions are made:—

Appointment
of chaplain.

Sect. 10. “There shall be appointed to every prison . . . a chaplain, being a clergyman of the established church.”

(*x*) Query, whether this is still in force.

Sect. 11. "The same person may officiate as chaplain of any two prisons situate within a convenient distance from each other, if such prisons together are calculated to receive not more than one hundred prisoners; but the chaplain of more than one prison, and the chaplain of any prison in which the average number of prisoners confined at any one time during the three years next before his appointment has not been less than one hundred, shall not, whilst holding his chaplaincy, hold any benefice with cure of souls or any curacy."

Appointment of chaplain to two prisons.

By sect. 12, "An assistant chaplain, being a clergyman of the established church, may be appointed to any prison which is deemed sufficiently large to require the appointment."

Assistant chaplains.

Sect. 13. "Notice of the nomination of a chaplain or assistant chaplain to a prison shall, within one month after it has taken place, be transmitted to the bishop of the diocese in which the prison is situate, and no chaplain or assistant chaplain shall officiate in any prison until he has obtained a licence for that purpose from the bishop of the diocese wherein the prison is situate, nor for any longer time than while such licence continues in force."

Notice to be sent to bishop as to chaplains and assistant chaplains.

By sect. 5 of the Prisons Act, 1877 (40 & 41 Vict. c. 21), the appointment of chaplains and assistant chaplains is now vested in the Home Secretary.

40 & 41 Vict. c. 21.

By sect. 35 of this last act, the officers attached to prisons within the act at the time of the commencement of the act are to hold their offices by the same tenure, and upon like terms and conditions as, and receive no smaller salaries than if the act had not passed, but they may be distributed among the several prisons within the act as the Secretary of State may direct.

Tenure of office and salaries of prison officers.

By sect. 15 of the Prisons Act, 1865, and sect. 36 of the Prisons Act, 1877, a superannuation allowance or gratuity may be granted to any officer of a prison. The chaplain is a prison officer.

Superannuation of officers.

By sect. 20 of the Prisons Act, 1877, "The regulations contained in the first schedule hereto with respect to the government of prisons shall be binding on all persons in the same manner as if they were enacted in the body of this act."

Regulations as to government of prisons.

"SCHEDULE I.

REGULATIONS FOR GOVERNMENT OF PRISONS.

Religious Instruction.

44. In every prison where there is no chapel a suitable room shall be set apart for the purposes of the chapel.

Room for use as chapel.

45. Prayers to be selected by the chaplain from the liturgy of the Established Church shall be read daily by the chaplain, gaoler, or such other person as may be appointed by the visiting justices, and at such time or times as may be fixed by them, and

Prayers.

portions of the Scriptures shall be read to the prisoners, when assembled for religious instruction, by the chaplain, or by such person with the consent of the visiting justices, as he may appoint.

Performance
of divine
service.

46. The Chaplain shall on every Sunday, and on Christmas Day and Good Friday, perform the appointed morning and evening services of the Established Church, and preach at such time or times as shall be fixed by him with the approval of the visiting justices. He shall give religious and moral instruction to the prisoners who are willing to receive it. He shall administer the Holy Sacrament of the Lord's Supper on suitable occasions to such prisoners as shall be desirous, and as he may deem to be in a proper frame of mind to receive the same. He shall frequently visit every room and cell of the prison occupied by prisoners, and shall direct such books to be distributed and read and such lessons to be taught in the prisons as he may deem proper for the religious instruction of the prisoners. Criminal prisoners shall attend divine service on Sundays, and on other days when such service is performed, unless prevented by illness or other reasonable cause, to be allowed by the gaoler, or unless their attendance is dispensed with by the visiting justices: This regulation shall not apply to any prisoner who is attended or visited by a minister of a church or persuasion differing from the Established Church: And no prisoner shall be compelled to attend any religious service held or performed, or any religious instruction given, by the chaplain, minister, or religious instructor of a church or persuasion to which the prisoner does not belong.

Ministers to
visit prisoners
under certain
restrictions.

47. If any prisoner is of a religious persuasion differing from that of the Established Church, and no minister has been appointed to attend at the prison on the prisoners of that persuasion, the visiting justices shall permit a minister of such persuasion, to be approved by them to visit such prisoner at proper and reasonable times, under such restrictions as may be imposed by the visiting justices to guard against the introduction of improper persons and prevent improper communications, unless such prisoner expressly objects to see such minister.

Books and
printed
papers.

48. No books or printed papers shall be admitted into any prison for the use of the prisoners, except by permission of the visiting justices: and no books or printed papers intended for the religious instruction of prisoners belonging to the Established Church shall be admitted but those chosen by the chaplain; Provided that in case there may be a difference of opinion between the chaplain and visiting justices with respect to books or papers proposed to be admitted for the religious instruction of a prisoner belonging to the Established Church, reference shall be had to the bishop of the diocese, whose decision shall be final; and, subject to such permission of the visiting justices as aforesaid, all books or printed papers admitted into any prison for

the religious instruction of prisoners belonging to any other persuasion, and who are visited by a minister of such persuasion, shall be approved by such minister; and the gaoler shall keep a catalogue of all books and printed papers admitted into the prison.

49. The chaplain shall communicate to the gaoler any abuse or impropriety in the prison which may come to his knowledge, and shall enter the same in his journal.

Chaplain to communicate abuses to gaoler.

50. Where an assistant chaplain is appointed to a prison, he shall be competent to perform any duty required by law to be performed by the chaplain; and when either of them, the chaplain or assistant chaplain, is absent from the prison, the other shall take his duties. Where there is no assistant chaplain, or in case of the services of the assistant chaplain not being available by reason of sickness or other unavoidable cause, the chaplain shall, when absent from the prison on leave or from any unavoidable cause, appoint, with the consent of the visiting justices, a substitute, and insert his name and residence in his journal. In the event of any sudden cause preventing the chaplain, or, in the absence of the chaplain, the assistant chaplain, from performing his duties, he may accept the assistance of a clergyman of the Established Church in the performance of divine service in the chapel, inserting the fact, and the name of such clergyman, in his journal.

Assistant chaplain and chaplain's substitute.

52. In the event of the death of any chaplain or assistant chaplain of a prison, . . . the visiting justices shall provide a substitute until the next meeting of the justices in sessions.

Substitute on death of chaplain or minister.

Prisoners under Sentence of Death.—61. The chaplain shall have free access to every such prisoner, unless the prisoner be of a religious persuasion differing from that of the Established Church, and be visited by a minister of such persuasion, in which case the minister of such persuasion shall have free access to him" (y).

Prisoners under sentence of death.

26 & 27 Vict. c. 79, "The Prison Ministers' Act, 1863," makes provision for the attendance of ministers belonging to dissenting bodies on persons professing their creed.

26 & 27 Vict. c. 79.

Under the powers given by the Prisons Act, 1877 (s. 57), rules were made for the government of prisons by the Home Secretary on Feb. 19, 1878. Of these rules, those numbered 27 to 42 both inclusive, refer to the duties of chaplains and prison ministers (z).

Rules.

Secondly, as to chaplains to union workhouses.

By the joint effect of 6 & 7 Will. c. 76, s. 15, and 10 & 11 Workhouses.

(y) Prayers for visitation of prisoners, and for prisoners under sentence of death, were compiled by the Irish Synod of 1711, and are to be found in the Irish Prayer Book published by Grierson, Dub-

lin, 1723.

(z) See House of Commons Parliamentary Papers, session 1878, vol. lxiii.; (Accounts and Papers, vol. xviii.) p. 717.

Vict. c. 109, s. 14, the administration of relief to the poor is to be subject to the direction and control of the poor law commissioners. And by 34 & 35 Vict. c. 70, the powers and duties of the now abolished poor law commissioners are transferred to the local government board.

Commissioners may direct overseers and guardians to appoint paid officers for parishes or unions;

and fix their duties, and the mode of appointment and dismissal, and the security;

and regulate their salaries.

Construction of term "officer."

No inmate of a workhouse obliged to attend any religious service contrary to his religious principles, &c.

By sect. 46, "It shall be lawful for the said commissioners (a), as and when they shall see fit, by order under their hands and seal, to direct the overseers or guardians of any parish or union, or of so many parishes or unions as the said commissioners may in such order specify and declare to be united for the purpose only of appointing and paying officers, to appoint such paid officers with such qualifications as the said commissioners shall think necessary for superintending or assisting in the administration of the relief and employment of the poor, and for the examining and auditing, allowing or disallowing of accounts in such parish or union, or united parishes, and otherwise carrying the provisions of this act into execution; and the said commissioners may and they are hereby empowered to define and specify and direct the execution of the respective duties of such officers, and the places or limits within which the same shall be performed, and direct the mode of the appointment and determine the continuance in office or dismissal of such officers, and the amount and nature of the security to be given by such of the said officers as the said commissioners shall think ought to give security, and, when the said commissioners may see occasion, to regulate the amount of salaries payable to such officers respectively, and the time and mode of payment thereof, and the proportions in which such respective parishes or unions shall contribute to such payment; and such salaries shall be chargeable upon and payable out of the poor rates of such parish or union, or respective parishes, in the manner and proportions fixed by the said commissioners, and shall be recoverable against the overseers or guardians of such parish or union, or parishes, by all such ways and means as the salaries of assistant overseers or other paid officers of any parish or union are recoverable by law; and all such payments shall be valid, and shall be allowed in the accounts of the overseers or guardians paying the same."

And by sect. 109 (the interpretation clause) the word "officer" shall be construed to extend to any clergyman. . . ."

By sect. 19, "No rules, orders, or regulations of the said commissioners, nor any bye-laws at present in force or to be hereafter made, shall oblige any inmate of any workhouse to attend any religious service which may be celebrated in a mode contrary to the religious principles of such inmate, nor shall authorize the education of any child in such workhouse in any religious creed other than that professed by the parents or surviving parent of such child, and to which such parents or

(a) Now, by 34 & 35 Vict. c. 70, the local government board.

parent shall object, or, in the case of an orphan, to which the godfather or godmother of such orphan shall so object: Provided also, that it shall and may be lawful for any licensed minister of the religious persuasion of any inmate of such workhouse, at all times in the day, on the request of such inmate, to visit such workhouse for the purpose of affording religious assistance to such inmate, and also for the purpose of instructing his child or children in the principles of their religion."

In the case of *Regina v. The Guardians of the Braintree Union* (b), it was holden that the 46th section given above empowered the poor law commissioners to require the guardians to appoint a clergyman to be chaplain of the workhouse, and the Court of Queen's Bench refused to inquire into the expediency of making such an order.

Regina v. Guardians of Braintree Union.

The chaplain of a poor-law union is a "paid officer" within the 46th and 48th sections, and so was removable by the Poor Law Commissioners as "unfit" for his office, at their discretion, without assigning any special grounds for such removal, and the court would not grant a *certiorari* to bring up and review such an order of removal (c).

Removal of chaplain.

A chaplain of a poor law union, whose appointment has been duly confirmed by the bishop, may read prayers in the workhouse, notwithstanding a prohibition from the incumbent of the parish, without committing any ecclesiastical offence (d).

May officiate against the will of the incumbent.

Cave, J., appears to have recently held that the chaplain of a workhouse could effectually charge or mortgage his salary (e).

May charge his salary.

By 31 & 32 Vict. c. 122, the Poor Law Amendment Act, 1868, ss. 16, 17, 20, and 22, a separate register of the religious creed of the inmates of the workhouse and every pauper school shall be kept. This register is to be open to the inspection of every neighbouring minister of every religious denomination. And the minister may, subject to proper regulations, visit and instruct all the inmates registered as of his religious creed. No child in the workhouse or school visited by a minister of its own religious creed shall be required to attend any other religious service, if the parents or surviving parent, or in the case of orphan or deserted children, the minister, object. This provision does not apply to children above twelve if they are considered competent to exercise a judgment on the subject.

Creed register.

Thirdly, as to chaplains to lunatic asyla.

By 16 & 17 Vict. c. 97 (The Lunatic Asylums Act, 1853), sects. 55 and 57, and by 25 & 26 Vict. c. 111 (The Lunacy Acts Amendment Act, 1862), sect. 3, provisions were made for the appointment and pay of chaplains to lunatic asyla, and to

Lunatic asyla.

(b) 5 Jur. p. 265.

(c) *Ex parte Molyneux*, 11 W. R. p. 233 (A.D. 1863).

(d) *Molyneux v. Bagshaw*, 9 Jur., N. S. p. 553 (A.D. 1863); and see

now 34 & 35 Vict. c. 66 (The Private Chapels Act, 1871), *infra*, Part VI., Chap. III., sect. 5.

(e) *Re Mirams*, L. R., 1 Q. B. 1891, p. 594.

burial grounds attached to such asyla. These provisions have now been superseded by the enactments following:—

53 & 54 Vict.
c. 5.

By sect. 276 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5), “(1.) The visiting committee of every asylum shall appoint—

“(a) A chaplain who shall be in priest’s orders and shall be licensed by the bishop of the diocese;

Appointment,
licence, and
salary of
chaplain.

“(2.) The visiting committee may appoint a minister of any religious persuasion to attend patients of the religious persuasion to which the minister belongs.

“(3.) The committee may remove any person appointed under this section, and if the office of chaplain, medical officer, superintendent, clerk, or treasurer becomes vacant, the committee shall appoint a person to fill the vacancy, subject to the restrictions affecting the original appointment, and they may in their discretion fill any vacancies among other officers and servants of the asylum.

“(5.) The salaries, wages, and remuneration of every person appointed under this section shall be fixed by the committee.”

Duties of.

By sect. 277, “(1.) The licence of a chaplain of an asylum shall be revocable by the bishop.

“(2.) The chaplain or his substitute approved by the committee shall perform in the chapel of the asylum or in some other convenient place belonging to the asylum divine service according to the rites of the Church of England on every Sunday, Christmas Day, and Good Friday. He shall also perform divine service and such other services according to the rites of the Church of England as the committee direct at such times as they appoint.

“(3.) If a patient is of a religious persuasion differing from that of the Established Church, a minister of his persuasion at the request of the patient or his friends, may, with the consent of the medical officer and under such regulations as he approves, visit the patient.”

Superannua-
tion allow-
ance.

By sect. 280, “(1.) The visiting committee may grant to any superintendent, chaplain, matron, or other officer or servant of the asylum who is incapacitated by confirmed illness, age or infirmity, or who has been an officer or servant in the asylum for not less than fifteen years and is not less than fifty years old, such superannuation allowance as the committee think fit. . . .

“(3.) A superannuation allowance shall not exceed two-thirds of the salary paid to the superannuated person at the date of superannuation and such further sum (if any) as the visitors think fit to grant having regard to the value of the lodgings, rations and other allowances enjoyed by the superannuated person.”

Transfer to
another
asylum.

By sect. 282, “When any officer is transferred from one asylum to another wholly or in part belonging to the same local authority, his service in all such asylums shall be counted for the purpose of computing his pension superannuation allowance

or gratuity for length of service as if all such asylums had constituted only one asylum."

The case of *Reg. v. The Middlesex Justices* (*f*), decided on the construction of the then statute 9 Geo. 4, c. 40, ruled that the visitors of a lunatic asylum might dismiss their chaplain without the consent of the bishop.

*Regina v.
The Middlesex
Justices.*

In the course of his judgment Mr. Justice Coleridge made the following remarks, which may be important as to the construction of the present act:—

"It is not reasonable to argue this question as if the only duties incumbent upon the chaplain were the performance of service on Sundays, and the great festivals, as prescribed in sect. 32. That is not a fair interpretation. Can it be supposed that the chaplain is not also to give spiritual advice and consolation to the patients in proper cases? If such a construction as this is required, the inference must be that the argument cannot be supported."

Fourthly, as to chaplains to cemeteries.

Cemeteries.

By 10 & 11 Vict. c. 65 (The Cemeteries Clauses Act, 1847), any cemetery company incorporated by special act of parliament may make provision for establishing a chaplain for their cemetery as follows:—

10 & 11 Vict.
c. 65.

Sect. 27. "The company shall from time to time, with the approval of the bishop of the diocese in which the cemetery is situated, appoint a clerk in holy orders of the Established Church to officiate as chaplain in the consecrated part of the cemetery; and such chaplain shall be licensed by and be subject to the jurisdiction of the said bishop, and the said bishop shall have power to revoke any such licence and to remove such chaplain for any cause which appears to him reasonable."

Chaplain to
be appointed
with consent
of the bishop.

Sect. 28. "The chaplain shall, when required, unless prevented by sickness or other reasonable cause, perform the burial service over all bodies brought to be buried in the consecrated part of the cemetery which are entitled to be buried in consecrated ground according to the rites and usage of the Established Church."

Chaplain to
perform burial
service when
required.

Sect. 29. "Any clerk in holy orders of the Established Church, not being prohibited by the bishop, nor under ecclesiastical censure, at the request of the executor of the will of any deceased person, or any other person having the charge of the burial of the body of any deceased person, and with the consent of the chaplain for the time being of the cemetery, or if there be no chaplain with the consent of the bishop, may perform the said burial service over such body in the consecrated part of the cemetery."

Other clergy-
men of the
Established
Church may
be allowed to
officiate.

Sect. 30. "The company out of the moneys to be received by virtue of this and the special act, shall allow to the chaplain of the cemetery for the time being such a stipend as is approved of

Company to
pay the chap-
lain a stipend
approved by
the bishop.

by the bishop of the diocese in which the cemetery is situated, which shall be payable by equal moieties on the 25th day of March and the 29th day of September in each year; and if any chaplain die, resign, or be removed or appointed, in the interval between the half-yearly days of payment, the company shall pay to him, or his executors or administrators, a part only of the half-yearly payment of the stipend proportioned to the time during which he shall have been the chaplain since the last preceding day of payment."

By sect. 31, this stipend may be recovered by action at law.

By sect. 32, the chaplain is to register the burials in the consecrated part of the cemetery.

Chaplains
under metro-
politan burial
acts.

By sect. 39 of 15 & 16 Vict. c. 85, "An Act to amend the Laws concerning the Burial of the Dead in the Metropolis" (which incorporates the previous act), the bishop of the diocese may confirm any arrangement of which a majority or in the case of equal numbers one-half of the incumbents concerned approve for paying a chaplain to a burial-ground provided for the common use of two or more parishes, either by salary or by a portion of the fees.

Sect. 7 of 20 & 21 Vict. c. 35, provides that the chaplain or chaplains appointed for the burial ground belonging to the parishes in the City of London under the last act shall conform to all such regulations laid down by the Commissioners of Sewers as shall not interfere with the performance of the funeral service according to the order of the church.

CHAPTER XVIII.

CIVIL STATUS OF THE CLERGY.

- SECT. 1.—*As to temporal Offices.*
 2.—*As to the Person.*
 3.—*As to Ecclesiastical Goods.*
 4.—*Freedom from Tolls, &c.*
 5.—*As to Sermons.*
 6.—*As to Franchises.*

SECT. 1.—*As to temporal Offices.*

THE common law, to the intent that ecclesiastical persons might the better discharge their duty in the celebration of divine service, and not be entangled with temporal business, has provided that they shall not be bound to serve in any temporal office (*a*). Not bound to serve in a temporal office.

And although a man holds lands or tenements, by reason whereof he ought to serve in a temporal office, yet if this man be made an ecclesiastical person within holy orders, he ought not to be elected to any such office; and if he be, he may have the king's writ for his discharge (*b*).

And this, although it be an office which he may execute by deputy: Thus in the *Case of the Vicar of Dartford*, in 12 Geo. 2, the court granted to him a writ of privilege against serving the office of expeditor to the commissioners of sewers, though it was insisted that this was an office which might be executed by deputy (*c*).

The general canon law forbids secular offices and employments to persons in holy orders. So do the following English constitutions (*d*):—

“No clergyman shall be an advocate in the secular court in a cause of blood, or in any other cause but such as are allowed by law. And if any shall do otherwise, if it be in a cause of blood, he shall be *ipso facto* suspended from his office; and if in any other cause, he shall be punished by his diocesan according to his discretion. And in causes of blood which shall extend to English canons.

(*a*) 1 Inst. p. 96.

(*b*) 2 Inst. p. 3.

(*c*) 2 Stra. p. 1107.

(*d*) For the ancient canon law on this subject, see Thomass. vol. iii. pt. 1, lib. 3.

life or member, we do strictly enjoin that no clergyman presume to be a judge or an assessor; and he who shall act contrary hereunto, besides the suspension from his office, which he shall *ipso facto* incur, shall be otherwise punished according to the discretion of his superior: From which sentence of suspension he shall by no means be absolved by his diocesan, until he shall have made competent satisfaction" (e).

And, more particularly, another constitution of the same legate: "Whereas it is unbecoming for clergymen employed in heavenly offices to minister in secular affairs; we think it sordid and base, that certain clerks greedily pursuing earthly gain and temporal jurisdictions, do receive secular jurisdiction from laymen, so as to be named justices, and to become ministers of justice, which they cannot administer without injury to the canonical dispositions, and to the clerical order: We, desiring to extirpate this horrid vice, do strictly enjoin all rectors of churches and perpetual vicars, and all others whatsoever constituted in the order of priesthood, that they receive no secular jurisdiction from a secular person, or presume to exercise the same; and if they do, they shall relinquish the same within the space of two months, and never resume it; and whosoever shall attempt anything contrary to the premises, shall be *ipso facto* suspended from his office and benefice; and if he shall intrude into his office or benefice during such suspension, he shall not escape canonical vengeance, which shall not be relaxed until he shall have made satisfaction at the discretion of his diocesan, and taken an oath that he will not do the like again. Saving the privileges of our lord and king in this behalf" (f).

Employment
under the
crown.

Which saving has been said to have entirely defeated the constitution (g). And in the former constitution there is also a saving for such causes as are allowed by law.

But if those savings had not been expressed, yet it is certain that the constitution could not have altered the law of the land in this respect. The kings of England in all ages have asserted and still possess a right to employ what subjects they please, of the clergy as well as laity, in any post of civil government; and, in fact, many clergymen have been chancellors, treasurers, and even chief justices of the King's Bench, and consequently must have sate judges in cases of life and death (h).

And where a petition was made to the crown that an ecclesiastical person should not be chancellor, treasurer, clerk of the privy seal, baron of the exchequer, chamberlain of the exchequer, comptroller, &c., the king answered, that he will do as he thinks fit (i).

All the chancellors of England, from the time of Becket to Wolsey, were either civilians or ecclesiastics. Walter De

(e) Otho. Athon, p. 91.

(f) Ibid. p. 89.

(g) Johnson's Canons, vol. ii.,

p. 220.

(h) 1 Black. Com. sect. 1, p. 17.

(i) 2 Roll. Abr. p. 221.

Merton, celebrated as the founder of the collegiate system in the universities of this country, was bred to the law, and was several times chancellor during the troubled reign of Henry the Third, before the close of which he became Bishop of Rochester. The last bishop who has filled this office was Dr. Williams, Bishop of Lincoln and Dean of Westminster, and afterwards Archbishop of York. This prelate held the great seal from 1621 to 1625. One of the negotiators for the Treaty of Utrecht was the Bishop of Bristol, the last precedent I believe which our history affords for the employment of a prelate in diplomatic services.

And by the statute of *Articuli Cleri*, 9 Edw. 2, st. 1, c. 8, it is complained as follows:—"Also barons of the King's Exchequer claiming by their privilege, that they ought to make answer to no complainant out of the same place, extend the same privilege unto clerks abiding there, called to orders or unto residence, and inhibit ordinaries that by no means, or for any cause, so long as they be in the Exchequer, or in the King's Service, they shall not call them to judgment." Unto which it is answered: "It pleaseth our lord the King, that such clerks as attend in his service, if they offend, shall be corrected by their ordinaries, like as other; but so long as they are occupied about the Exchequer, they shall not be bound to keep residence in their churches. This is added of new by the king's council: The King and his ancestors, since time out of mind have used, that clerks which are employed in his service, during such time as they are in service, shall not be compelled to keep residence in their benefices; and such things as be thought necessary for the King and commonwealth, ought not to be said to be prejudicial to the liberty of the church" (*k*).

9 Edw. 2,
st. 1, c. 8.
As to clerks
in the
exchequer.

Ecclesiastical persons have this privilege, that they ought not in person to serve in war; *militans Deo ne implicit se negotiis secularibus* (*l*).

Not bound to
serve in war.

Such as be within orders of the ministry, or clergy, cannot be empannelled as jurors (*m*).

Exempted
from serving
on juries.

SECT. 2.—*As to the Person.*

By the common law a clerk in holy orders *cundo, morando aut redeundo* from divine service, cannot be arrested (*n*).

Freedom
from arrest.

In the cases of *McGeath v. Geraghty* and *Blane v. Geraghty* (*o*), it was holden by the Court of Queen's Bench and Common

(*k*) See the commentary by Lord Coke on this statute, 2 Inst. p. 624.

(*l*) 2 Inst. p. 3.

(*m*) Lambard, *Eirenarcha* bk. 4, ch. 3, p. 396; *Beecher's case*, 4 Leon.

p. 190.

(*n*) 12 Co. p. 100; *Pit v. Webby*, 2 Bulstr. p. 72.

(*o*) 15 W. R. pp. 127, 133 (1866).

Pleas in Ireland, that a clergyman duly cited to attend a visitation by the ordinary of his diocese is privileged from arrest *eundo, redeundo et morando*.

Liberty to conduct worship in any building.

By 18 & 19 Vict. c. 86, s. 1, the incumbent, or where he is not resident, the curate of any parish or district or "any person authorized by them respectively," may have a "congregation or assembly for religious worship," within his parish or district, without such congregation or assembly being subject to the acts 1 Will. & Mar. sess. 1, c. 18, 52 Geo. 3, c. 155, and 15 & 16 Vict. c. 36, requiring registration of and otherwise controlling all places of worship other than churches or chapels of the Church of England.

Not to be obstructed in their office.

By 24 & 25 Vict. c. 100, s. 36, "Whosoever shall, by threats or force, obstruct or prevent, or endeavour to obstruct or prevent, any clergyman or other minister in or from celebrating divine service or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any church-yard or other burial place, or shall strike or offer any violence to, or shall, upon any civil process, or under pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour."



SECT. 3.—*As to Ecclesiastical Goods.*

The sheriff cannot levy of his ecclesiastical goods.

If a person be bound in a recognizance in the chancery or other court, and he pay not the sum at the day; by the common law, if the person had nothing but ecclesiastical goods, the recognizee could not have had a *levari facias* to the sheriff to levy the same of these goods, but the writ ought to be directed to the bishop of the diocese to levy the same of his ecclesiastical goods (*p*). And an attachment will go against the chancellor for not returning it (*q*). The bishop acts by sequestration of the benefice (*r*).

The writ must be to the bishop.

9 Edw. 2, st. 1, c. 9.
Distresses not to be taken in the fees of the church.

By the statute *Articuli Cleri*, 9 Edw. 2, st. 1, c. 9, it is complained, that "Also the king's officers, as sheriffs and other, do enter into the fees of the church to take distresses, and sometimes they take the parson's beasts in the king's highway, where they have nothing but the land belonging to the church." The

(*p*) 2 Inst. p. 4.

(*q*) *Rev v. Bp. of St. Asaph*, 1 Wils. p. 332.

(*r*) Vide *infra*, as to sequestrations, Part IV., Chap. X., sect. 5.

answer: "The king's pleasure is, that from henceforth such distresses shall neither be taken in the king's highway, nor in the fees wherewith churches in times past have been endowed; nevertheless, he willeth distresses to be taken in possessions of the church newly purchased by ecclesiastical persons" (s).

If any ecclesiastical person acknowledged a statute merchant or statute staple, or a recognizance in the nature of a statute staple; his body could not be taken by force of any process thereupon (t).

Ecclesiastics not to be taken on a statute merchant or staple.

SECT. 4.—*Freedom from Tolls, &c.*

Amongst the Saxons, the lands of the clergy were charged to castles, bridges and expeditions (u).

But after the introduction of the Roman canon law, they obtained exemptions.

Free from tolls and other charges by the common law.

And Lord Coke says, that ecclesiastical persons ought to be quit and discharged of tolls and customs, avirage, pontage, paviage, and the like, for their ecclesiastical goods; and if they be molested therefore, they may have a writ for their discharge (x).

But this and the like are always to be understood with this exception, viz. provided that no act of parliament has ordered otherwise.

Anciently, indeed, it was holden, that clergymen are not to be burdened in the general charges with the laity of this realm, neither to be troubled or incumbered, unless they be specially named and expressly charged by some statute (y).

Not freed from general charges by act of parliament.

But now the contrary doctrine prevails, that clergymen are liable to all charges by act of parliament, unless they are specially exempted.

Thus they are, both in respect of their tithes and glebes, liable to contribute to watch and ward and to the repair of the highways, and may be rated or taxed by the commissioners of sewers; they, as well as laymen, are chargeable to the poor maimed soldiers or poor prisoners, and county rates, and shall contribute towards satisfying for a robbery committed within the hundred, and all other public charges imposed by act of parliament. And this has been resolved upon debate, as Hale, Chief Justice, said, before all the judges (27 Car. 2), in the case of *Webb v. Batchelor* (z).

(s) See for a commentary on this statute, Lind. p. 268; 2 Inst. p. 627; Gibs. p. 15.

(t) 2 Inst. p. 4.

(u) Wake, State of the Church and Clergy of England, ch. 1, p. 2.

(x) 2 Inst. p. 3; see Degge, pt. 1, c. 11.

(y) God. p. 194.

(z) Wats. ch. 40, p. 423; 3 Keb. pp. 476, 507; s.c. nom. *Webb v. Batchelour*, 2 Vent. p. 273; nom. *Webb v. Batchelor*, 2 Lev. p. 139.

And particularly in the case of bridges, the statute 22 Hen. 8, c. 5, says, the justices of the peace shall assess every inhabitant towards their repair; by which words, every inhabitant, Lord Coke says, all privileges of exemptions or discharges whatsoever from contribution (if any were) are taken away, although the exemption were by act of parliament (a).

And in respect of the highways, where the statutes direct that the parishioners of every parish shall repair, Mr. Hawkins observes thereupon, that persons in holy orders are within the purview of these statutes in respect of their spiritual possessions, as much as any other persons whatsoever, in respect of any other possessions, for the words are general, and there is no kind of intimation that any particular persons shall be exempted more than others (b).

Turnpikes. The clergy are exempted from paying toll at turnpike gates when on parochial duty (c).



SECT. 5.—*As to Sermons.*

Gathercole v. Miall.

The degree of protection which the law affords to clergymen with respect to the preaching, not the publishing, of sermons, and the administration of private, not parochial, charities within their parish, was much discussed in the year 1846 in the case of *Gathercole v. Miall* (d). With respect to the latter point, the Barons of the Exchequer were all of opinion, to use the language of Chief Baron Pollock, "That a parochial charity, with the vicar at the head of it, among other persons in the parish, not for parochial purposes, but for some exclusive purpose, with reference either to religious opinion or to anything else, is a private matter, and is not open to what may be called licentious comment as opposed to a comment that must be based in truth" (e).

And Baron Alderson said in effect "that even if preached sermons were within the limits of the ordinary rule which governs the criticism upon public acts of individuals, that position would not affect the vicar's administration of a private charity within his parish.

"It is no part," said the learned Baron, "of his peculiar ministerial duty to have a clothing club, though it is a very

(a) 2 Inst. p. 703.

(b) 1 Hawkins Summary of Crown Law, p. 234.

(c) The Turnpike Acts are, 3 Geo. 4, c. 126; 1 & 2 Will. 4, c. 25. See *Temple v. Dickinson*, 1 E. & E. p. 34; 5 Jur., N. S. p. 363; and *supra*, p. 443. But see also *Layard*

v. Ovey, L. R., 3 Q. B. p. 415, and *Brunskill v. Watson*, L. R., 3 Q. B. p. 418.

(d) 15 M. & W. p. 319; 10 Jur. p. 337.

(e) See *Kelly v. Tinling*, L. R., 1 Q. B. p. 699; 12 Jur., N. S. p. 940.

proper thing for him or any other charitable man to do. I am at a loss to see how his case differs from that of any other individual who chooses to institute a private charity within particular limits. If so, then the criticism and observations which are to be made upon him are the criticism and observations which are to be made upon any other private individual, and are to be judged by the same rules and subject to the same limits."

But with respect to sermons preached and not published the opinion of Baron Parke (Lord Wensleydale) was thus expressed to the jury, and he appears to have retained the opinion when the matter was discussed in Banc, that a sermon preached by a clergyman to his parishioners, unless he published it and thereby offered it as a subject for general criticism like any other literary work, could not be considered as the public act of a public servant on which every one had a right to comment. Chief Baron Pollock agreed with this view, and said, "My opinion goes entirely along with the intimation of opinion that fell from my Brother Parke at the trial. I think a sermon preached to a congregation may undoubtedly be made the subject of a comment, but you must not put into the mouth of the pastor language that he did not use, or make any comment upon what he did use, or was supposed to use, that does not fairly arise out of the truth. I think you are fettered, with respect to a sermon preached to a congregation, just as you would be fettered with respect to any other matter on which you have a right to comment, but on which you must comment with truth and with justice."

Baron Alderson doubted, and Baron Rolfe (Lord Cranworth) was of a contrary opinion, and thought that comments on sermons would come within the category of public acts.

It appears to me that this is the opinion which would probably prevail if this question was to undergo a fresh discussion.

It would appear from the case of *Laughton v. The Bishop of Sodor and Man* (*ee*), that a bishop's charge to his clergy is in the ordinary sense of the term a privileged communication, although it contains criminatory matter which otherwise would be defamatory of some person and actionable.

Bishop's charge.

SECT. 6.—*As to Franchises.*

Ineligibility to the House of Commons is perhaps not a privilege; but I will mention here that it was a much controverted question whether before the passing of 41 Geo. 3, c. 63, s. 4, clerks in holy orders were eligible for a seat in the House of Commons.

It is remarkable that Coke (*f*), Chief Baron Gilbert (*g*), and

(*ee*) L. R., 4 P. C. p. 495.
(*f*) 4 Inst. p. 47.

(*g*) Gilbert, Treatise on the Court of Exchequer, pp. 49—60.

May not sit in House of Commons.

Blackstone (*h*), pronounced them ineligible because they sat in convocation. This reason is certainly not satisfactory; nevertheless both Houses of Parliament in Henry the Eighth's time, by a joint committee, appear to have given this reason for the ineligibility of clerks in holy orders to be members of the House of Commons (*i*).

41 Geo. 3,
c. 63.

But in 1801 the statute 41 Geo. 3, c. 63, was passed "to remove all doubts relative to the eligibility of persons in holy orders, to sit in the House of Commons, and thereby not only Horne Tooke, who being in priest's orders had been returned for Old Sarum, and was a candidate for Westminster in the next Parliament, was rendered ineligible; but deacons, one of which order then sat in the house (*k*), were put in the same category.

No person, ordained a priest or deacon, shall be capable of being elected a member of the House of Commons.

The election of such person shall be void; and if any person after his election shall be ordained a priest, &c., he shall vacate his seat.

Penalty for sitting or voting in either case.

By this act, sect. 1, "No person having been ordained to the office of priest or deacon, or being a minister of the Church of Scotland, is or shall be capable of being elected to serve in parliament as a member of the House of Commons."

Sect. 2. "If any person, having been ordained to the office of priest or deacon, or being a minister of the Church of Scotland, shall hereafter be elected to serve in parliament as aforesaid, such election and return shall be void; and if any person, being elected to serve in parliament as a member of the House of Commons, shall, after his election, be ordained to the office of priest or deacon, or become a minister of the Church of Scotland, then and in such case the seat of such person shall immediately become void; and if any such person shall, in any of the aforesaid cases, presume to sit or vote as a member of the House of Commons, he shall forfeit the sum of five hundred pounds for every day in which he shall sit or vote in the said house, to any person or persons who shall sue for the same in any of his

(*h*) 1 Black. Comm. p. 175. "Next, as to the qualification of persons to be elected members of the House of Commons. Some of these depend upon the law and custom of parliament declared by the House of Commons, others upon certain statutes. And from these it appears, (1) that they must not be aliens born or minors; (2) that they must not be of the twelve judges,* because they sit in the lords' house; nor of the clergy,† for they sit in the convocation." Mr. (afterwards judge) Coleridge makes this note to his edition of Blackstone: "There is great reason to doubt whether this was

correctly laid down at the time it was written, and at all events this reason is a very unsatisfactory one—it would not apply to unbene-ficed clergymen, and might be used with equal force to exclude bishops from the House of Lords."

(*i*) Atterbury, Rights, Powers and Privileges of an English Convocation, p. 71.

(*k*) He had been pronounced eligible by a committee Feb. 24 1785 (40 Journ. 561). See 2 Luder, Election Cases, *Case of the Borough of Newport*, p. 269, and the learned notes of the editor, p. 308. This case exhausts the law before the statute.

* Comm. Journ., 9th Nov. 1605.

† Comm. Journ., 13th Oct. 1553, 8th Feb. 1620, 17th Jan. 1661.

Majesty's courts at Westminster; and the money so forfeited shall be recovered by the person or persons so suing, with full costs of suit, in any of the said courts, by any action of debt, bill, plaint or information, in which no essoign, privilege, protection or wager of law, or more than one imparlance, shall be allowed; and every person against whom any such penalty or forfeiture shall be recovered by virtue of this act, shall be from thenceforth incapable of taking, holding or enjoying any benefice, living or promotion ecclesiastical, and of taking, holding or enjoying any office of honour or profit under His Majesty, his heirs or successors. . . . " (l).

Sect. 4. "Proof of the celebration of divine service, according to the rites of the Church of England or of the Church of Scotland, in any church or chapel consecrated or set apart for public worship, shall be deemed and taken to be *prima facie* evidence of the fact of such person having been ordained to the office of a priest or deacon, or of his being a minister of the Church of Scotland, within the intent and meaning of this act.

What proof shall be necessary.

By 5 & 6 Will. 4, c. 76, the act to provide for the regulation of municipal corporations, sect. 28, "No person being in holy orders . . . shall be qualified to be elected, or to be a councillor of any such borough, or an alderman of any such borough," as in the act mentioned.

May not be mayor, alderman or town councillor.

Now the place of 5 & 6 Will. 4, c. 76, is taken by 45 & 46 Vict. c. 50, which provides as follows:—

45 & 46 Vict. c. 50.

Sect. 12. "A person shall be disqualified for being elected and for being a councillor if and while he . . . is in holy orders, or the regular minister of a dissenting congregation."

Sect. 14. "(3) A person shall not be qualified to be elected or to be an alderman, unless he is a councillor or qualified to be a councillor."

Sect. 15. "The mayor shall be a fit person elected by the council from among the aldermen or councillors or persons qualified to be such."

Therefore a clergyman still cannot be a town councillor, an alderman, or a mayor.

None of these acts, however, extend to such persons as have, under the Clerical Disabilities Act, 1870 (33 & 34 Vict. c. 91), executed a deed of relinquishment of their clerical profession, and thus become, in the eye of the secular law, laymen. This act will be mentioned at length hereafter (m).

Clerical Disabilities Act, 1870.

But by 51 & 52 Vict. c. 41, s. 2, it is provided as to county councils, that "clerks in holy orders and other ministers of religion shall not be disqualified for being elected and being aldermen or councillors."

51 & 52 Vict. c. 41.

County councillors.

It seems, moreover, that by 56 & 57 Vict. c. 73, ss. 3, 20, clerks in holy orders are not disqualified from being parish councillors or district councillors.

Parish and district councillors.

(l) The third section relates to the limitation of time within which actions for penalties must be

brought.

(m) Vide infra, Part IV., Chap. III., sect. 7.

PART III.

THE CHURCH IN HER RELATION TO THE GENERAL LIFE OF HER MEMBERS.

CHAPTER I.

INTRODUCTORY.

Subjects of
this part.

WE now proceed to consider the offices of the church in her relation to the general life of her members, clergy and laity:—

1. The Sacrament of Baptism.
2. The Catechism, that is to say, an Instruction to be learned of every person before he be brought to be confirmed by the Bishop.
3. The Rite of Confirmation.
4. The Sacrament of the Lord's Supper.
5. The Discipline of Confession.
6. Marriage.
7. The Churching of Women.
8. The Office for the Visitation of the Sick.
9. The Order for the Burial of the Dead.
10. The Liturgy and Ritual.

The Sacraments.

The sacra-
ments.

It is the office of the church to train and educate men for another world. She begins to do so from their birth, and continues to do so till their death.

The church discharges this office, and effects this training and education, by the administration of the sacraments, properly so called (*a*); by the performance of holy and sacramental rites on the most important occasions of life; and by continual daily worship, as well as by special services for which provision is made in her Liturgy; also by the discipline through which she reclaims erring members and enforces penitence for sin.

(*a*) It is a principle of the canon law that the sacrament is not to be repeated on account of some imperfection in the administration of it: "in talibus non est aliquid iteran-

dum, sed cautè supplendum quod incautè fuerat prætermisum." X. i. 16, 1, De Sacramentis non iterandis.

The word *sacramentum* signified in its general meaning an oath. The oath of allegiance and obedience taken by the Roman soldiers was called "*sacramentum militare*." The later Fathers of the church applied the term to designate a holy mystery, as the Greek Fathers used the term *μυστήριον* (*b*). The church adopted the definition of St. Augustine, "*invisibilis gratiæ visibilis forma, ut ejus similitudinem generet et causa existat*" (*c*). The English Church expresses most clearly the Catholic doctrine defining a sacrament to be "an outward visible sign of an inward spiritual grace given unto us, ordained by Christ himself as a means whereby we receive the same, and a pledge to assure us thereof." It has two parts: "the outward visible sign—the inward spiritual grace."

Upon the number of sacraments the different branches of the church are not agreed. The modern Roman (*d*) and Greek church enumerate seven:—(1.) *Baptismus*, τὸ βάπτισμα. (2.) *Confirmatio*, τὸ χρίσμα. (3.) *Eucharistia*, ἡ δεῖα κοινωνία, ἡ εὐχαριστία, τὸ κυριακὸν δεῖπνον. (4.) *Pœnitentia*, ἡ μετανοία. (5.) *Extrema unctio*, τὸ ἅγιον ἔλαιον. (6.) *Ordo*, ἡ ἱερωσύνη, χριστονομία. (7.) *Matrimonium*, ὁ γάμος.

Number of sacraments.

The doctrine of the Church of England is thus expressed in her twenty-fifth Article:—"There are two sacraments ordained of Christ our Lord in the Gospel, that is to say, baptism and the supper of the Lord."

Doctrine of the Church of England.

"Those five commonly called sacraments, that is to say, confirmation, penance, orders, matrimony and extreme unction, are not to be counted for sacraments of the Gospel, being such as have grown partly of the corrupt following of the apostles, partly are states of life allowed by the Scriptures; but yet have not like nature of sacraments with baptism and the Lord's supper, for that they have not any visible sign or ceremony ordained of God."

Article 25.

And in her Catechism the Church of England says, that Christ ordained in his church two sacraments only as "generally necessary to salvation," baptism and the supper of the Lord.

Catechism.

(*b*) Cf. Coloss. i. 27; Ephes. i. 9, v. 32; 1 Tim. iii. 16.

(*c*) "*Sacrificium est visibile, invisibile sacramentum, id est sacrum signum. Sacramentum est invisibilis gratiæ visibilis forma.*" Dist. xi. c. 32.

(*d*) *Modern*, because at first baptism and the Lord's Supper were the only sacraments; afterwards the chrisma was added. It was not till the beginning of the twelfth century that the number of sacraments was increased to seven, and the addition cannot be said to have received papal authority till A.D.

1439. "*Sunt autem sacramenta, baptisma, chrisma, corpus et sanguis Christi; quæ ob id sacramenta dicuntur, quia sub tegumento corporalium rerum, virtus divina secretius salutem eorundem sacramentorum operatur.*" 1 Q. 1, 84. The Council of Trent (Conc. Trid. Sess. VII. C. 1, *De Sacrament. in gen.*) anathematizes all who deny that seven sacraments were instituted by our Lord. Cf. Eichhorn Grundsätze des Kirchenrechts II. 262; Müller, Lexicon des Kirchenrechts, tit. "Sakramente."

Homilies.

And in one of her Homilies she says, "You shall hear how many sacraments there be that were instituted by our Saviour Christ, and are to be continued and received of every Christian in due time and order, and for such purpose as our Saviour Christ willed them to be received. And as for the number of them, if they should be considered according to the exact signification of a sacrament, namely, for the visible signs expressly commanded in the New Testament, whereunto is annexed the promise of free forgiveness of our sins, and of our holiness and joining in Christ, there be but two, namely, baptism and the supper of the Lord. For although absolution hath the promise of forgiveness of sin, yet by the express word of the New Testament it hath not this promise annexed and tied to the visible sign, which is imposition of hands. For this visible sign—I mean laying on of hands—is not expressly commanded in the New Testament to be used in absolution as the visible signs in baptism and the Lord's supper are: and therefore absolution is no such sacrament as baptism and the communion are. And though the ordering of ministers hath this visible sign and promise, yet it lacks the promise of remission of sin, as all other sacraments besides the two above mentioned do. Therefore neither it, nor any other sacrament else, be such sacraments as baptism and communion are. But in a general acception, the name of a sacrament may be attributed to any thing, whereby an holy thing is signified. In which understanding of the word the ancient writers have given this name, not only to the other five, commonly of late years taken and used for supplying of the number of the seven sacraments, but also to divers and sundry other ceremonies, as to oil, washing of feet and such like, not meaning thereby to repute them as sacraments in the same signification that the two forenamed sacraments are. And therefore, St. Augustine, weighing the true signification and the exact meaning of the word, writing to Januarius, and also in the Third Book of Christian Doctrine, affirmeth that the sacraments of the Christians, as they are most excellent in signification, so are they most few in number; and in both places maketh mention expressly of two, the sacrament of baptism and the supper of the Lord. And although there are retained by the order of the Church of England, besides these two, certain other rites and ceremonies about the institution of ministers in the church, matrimony, confirmation of children, by examining them of their knowledge in the articles of the faith, and joining thereto the prayers of the church for them, and likewise for the visitation of the sick; yet no man ought to take these for sacraments in such signification and meaning as the sacraments of baptism and the Lord's supper are; but either for godly states of life necessary in Christ's church, and therefore worthy to be set forth by public action and solemnity by the ministry of the

church, or else judged to be such ordinances as may make for the instruction, comfort and edification of Christ's Church" (e).

By Can. 57 of 1603, "Whereas divers persons, seduced by false teachers, do refuse to have their children baptized by a minister that is no preacher, and to receive the Holy Communion at his hands in the same respect, as though the virtue of those sacraments did depend upon his ability to preach: forasmuch as the doctrine both of baptism and of the Lord's supper is so sufficiently set down in the Book of Common Prayer to be used at the administration of the said sacraments, as nothing can be added unto it that is material and necessary: we do require and charge every such person seduced as aforesaid, to reform that their wilfulness, and to submit himself to the order of the church in that behalf, both the said sacraments being equally effectual, whether they be ministered by a minister that is no preacher, or by one that is a preacher. And if any hereafter shall offend herein, or leave their own parish churches in that respect, and communicate, or cause their children to be baptized in other parishes abroad, and will not be moved thereby to reform that their error and unlawful course: let them be presented to the ordinary of the place by the minister, churchwardens, and side-men or questmen of the parishes where they dwell, and there receive such punishment by ecclesiastical censures, as such obstinacy doth worthily deserve: that is, let them (persisting in their wilfulness) be suspended, and then after a month's further obstinacy excommunicated. And likewise, if any parson, vicar or curate, shall after the publishing hereof, either receive to the communion any such persons which are not of his own church and parish, or shall baptize any of their children, thereby strengthening them in their said errors: let him be suspended, and not released thereof, until he do faithfully promise that he will not afterwards offend therein."

(e) Homily—Common Prayer and Sacraments ought to be administered in a Tongue that is under-

stood of the Hearers. Homilies, pp. 355, 356.

CHAPTER II.

BAPTISM.

- SECT. 1.—*Administration of the Rite.*
 2.—*Registration of Baptism.*
 3.—*No Fee for Baptism.*

SECT. 1.—*Administration of the Rite.*

Form of the
rite.

THE entrance into the church is through the sacrament of baptism. Wheatly remarks that, "As to the form of baptism, our Saviour only instituted the essential parts of it, viz., that it should be performed by a proper minister with water, in the name of the Father, Son and Holy Ghost (*a*). But as for the rites and circumstances of the administration of it, he left them to the determination of the apostles and the church. Yet without doubt a form of baptism was very early agreed upon, because almost all churches in the world do administer it much after the same manner. The latter ages indeed had made some superfluous additions, but our Reformers removed them, and restored this office to a nearer resemblance of the ancient model than any other church can show. We have now three several offices in our Liturgy, viz., one for public baptism of infants in the church, another for private baptism of children in houses, and a third for such as are of riper years and able to answer for themselves (*b*)."

Baptism of
infants.

Art. 27. "The baptism of young children is any wise to be retained in the church, as most agreeable with the institution of Christ."

Rubr. "The curates of every parish shall often admonish the people that they defer not the baptism of their children longer than the first or second Sunday next after their birth, or other holiday falling between; unless upon a great and reasonable cause, to be approved by the curate."

Public
baptism.

At first baptism was administered publicly, as occasion served, by rivers; afterwards, at the entrance of the church or very near it, the baptistery was built, which had a large bason in it that held the persons to be baptized, and they went down by steps into it. Afterwards, when immersion came to be disused,

(*a*) Matth. xxviii. 19.

(*b*) Wheatly on the Book of Common Prayer, p. 281.

fonts were set up at the entrance of churches (c). But our church still contemplates immersion as the usual course.

Our provincial constitutions require that there shall be a font of stone, or other competent material, in every church, which shall be decently covered and kept, and not converted to other uses (d). Font.

And by Can. 81 of 1603, "According to a former constitution too much neglected in many places, we appoint that there shall be a font of stone in every church and chapel where baptism is to be ministered; the same to be set in the ancient usual places, in which only font the minister shall baptize publicly." Canon 81.

Rubr. "The people are to be admonished that it is most convenient that baptism shall not be administered but upon Sundays and other holy-days, when the most number of people come together; as well for that the congregation there present may testify the receiving of them that be newly baptized into the number of Christ's church, as also because in the baptism of infants every man present may be put in remembrance of his own profession made to God in his baptism. Nevertheless (if necessity so require) children may be baptized upon any other day." When.

And by Can. 68, "No minister shall refuse or delay to christen any child according to the form of the Book of Common Prayer, that is brought to the church to him upon Sundays or holy-days to be christened or to bury any corpse that is brought to the church or churchyard (convenient warning being given him thereof before, in such manner and form as is prescribed by the Book of Common Prayer). And if he shall refuse to christen the one or bury the other (except the party deceased were denounced excommunicated *majori excommunicatione* for some grievous and notorious crime and no man able to testify of his repentance), he shall be suspended, by the bishop of the diocese, from his ministry by the space of three months." Canon 68.
Minister not to delay.

Rubr. "When there are children to be baptized, the parents shall give knowledge thereof over night, or in the morning before the beginning of morning prayer, to the curate." Previous notice.

Rubr. "There shall be for every male child to be baptized, two godfathers and one godmother; and for every female, one godfather and two godmothers." Godfathers.

Can. 29. "No parent shall be urged to be present, nor be admitted to answer as godfather for his own child; nor any godfather or godmother shall be suffered to make any other answer or speech than by the Book of Common Prayer is prescribed in that behalf. Neither shall any person be admitted godfather or godmother to any child at christening or confirmation, before the said person so undertaking hath received the holy communion." Canon 29.

In 1865 the convocation of the province of Canterbury, with New canon.

(c) 1 Stillingfleet Eccl. Cases, p. 146.

(d) Lind. p. 241.

the royal licence, framed a new canon, which repealed the prohibition to parents of being godparents to their children. This canon has, however, never been ratified by the crown; and no such canon was passed by the York convocation (e).

At what time
to attend.

Rubr. "And the godfathers and godmothers, and the people with the children, must be ready at the font, either immediately after the last lesson at morning prayer, or else immediately after the last lesson at evening prayer, as the curate by his discretion shall appoint."

Office.

Rubr. "And the priest coming to the font, which is then to be filled with pure water, and standing there shall say. . . ."

Note, the questions in the office of the 2nd Edw. 6, Dost thou renounce, and so on, were put to the child, and not to the godfathers and godmothers; which (with all due submission) seems more applicable to the end of the institution; besides that it is not consistent (as it seems) with the propriety of language, to say to three persons collectively, Dost thou in the name of this child do this or that? But it seems to be more inconsistent to say to the child, Dost thou in the name of this child? The expression, Dost thou, may apply to the sponsors individually.

Naming the
child.

By a constitution of Archbishop Peccham, "The ministers shall take care not to permit wanton names, which being pronounced do sound to lasciviousness, to be given to children baptized, especially of the female sex; and if otherwise it be done, the same shall be changed by the bishop at confirmation" (f).

Dipping.

Rubr. "Then the priest shall take the child into his hands, and shall say to the godfathers and godmothers, Name this child; and then naming it after them (if they shall certify him that the child may well endure it) he shall dip it in the water discreetly and warily, saying, N. I baptize thee, in the name of the Father, and of the Son, and of the Holy Ghost."

This was according to ancient usage.

"But if they certify that the child is weak, it shall suffice to pour water upon it" (g).

The dipping by the office of the 2 Edw. 6 was not all over; but they first dipped the right side, then the left, then the face towards the font.

Cross.

Rubr. "Here the priest shall make a cross upon the child's forehead." "To take away all scruple concerning the use of the sign of the cross in baptism, the true explication thereof, and the just reasons for the retaining of it, may be seen in the thirtieth canon" of 1603, which canon is as follows:—

Canon 30.

"We are sorry that his Majestie's most princely care and pains taken in the Conference at Hampton Court, amongst many other points, touching this one of the cross in baptism, hath taken no

(e) Vide infra, Part VII. Chap. II. III., Chap. IV.

(g) Johnson's Canons, vol. ii.,

(f) Lind. p. 246, vide infra, Part pp. 261, 277.

better effect with many, but that still the use of it in baptism is so greatly stuck at and impugned. For the further declaration therefore of the true use of this ceremony, and for the removing of all such scruple as might any ways trouble the consciences of them who are indeed rightly religious, following the royal steps of our most worthy King, because he therein followeth the rules of the scriptures, and the practice of the Primitive Church; we do commend to all the true members of the Church of England, these our Directions and Observations ensuing.

“First. It is to be observed, That although the Jews and Ethnics derided both the Apostles, and the rest of the Christians, for preaching and believing in him who was crucified upon the cross; yet all, both Apostles and Christians, were so far from being discouraged from their profession by the ignominy of the cross, as they rather rejoiced and triumphed in it. Yea, the Holy Ghost by the mouths of the Apostles, did honour the name of the cross (being hateful among the Jews), so far, that under it he comprehended not only Christ crucified, but the force, effects, and merits of his death and passion, with all the comforts, fruits, and promises, which we receive or expect thereby.

“Secondly. The honour and dignity of the name of the cross, begat a reverend estimation even in the Apostles’ times, (for aught that is known to the contrary) of the sign of the cross, which the Christians shortly after used in all their actions, thereby making an outward show and profession even to the astonishment of the Jews, that they were not ashamed to acknowledge him for their Lord and Saviour, who died for them upon the cross. And this sign they did not only use themselves with a kind of glory, when they met with any Jews, but signed therewith their children when they were christened, to dedicate them by that badge to his service, whose benefits bestowed upon them in baptism, the name of the cross did represent. And this use of the sign of the cross in baptism was held in the Primitive Church, as well by the Greeks as the Latins, with one consent and great applause. At what time, if any had opposed themselves against it, they would certainly have been censured as enemies of the name of the cross, and consequently of Christ’s merits, the sign whereof they could no better endure. This continual and general use of the sign of the cross, is evident by many testimonies of the ancient fathers.

“Thirdly. It must be confessed, that in process of time the sign of the cross was greatly abused in the Church of Rome, especially after that corruption of popery had once possessed it. But the abuse of a thing doth not take away the lawful use of it. Nay, so far was it from the purpose of the Church of England to forsake and reject the Churches of Italy, France, Spain, Germany, or any such like churches, in all things which they held and practised, that, as the apology of the Church of England confesseth, it doth with reverence retain those ceremonies, which do neither endamage the Church of God, nor

offend the minds of sober men: and only departed from them in those particular points, wherein they were fallen both from themselves in their ancient integrity, and from the Apostolical Churches which were their first founders. In which respect, amongst some other very ancient ceremonies, the sign of the cross in baptism hath been retained in this church, both by the judgment and practice of those reverend fathers and great divines in the days of King Edward the Sixth, of whom some constantly suffered for the profession of the truth; and others being exiled in the time of Queen Mary, did after their return in the beginning of the reign of our late dread Sovereign, continually defend and use the same. This resolution and practice of our Church hath been allowed and approved by the censure upon the Communion Book in King Edward the Sixth his days, and by the harmony of confessions of latter years; because indeed the use of this sign in baptism, was ever accompanied here with such sufficient cautions and exceptions against all popish superstition and error, as in the like cases are either fit or convenient.

“First, the Church of England since the abolishing of popery hath ever held and taught, and so doth hold and teach still, that the sign of the cross used in baptism, is no part of the substance of that sacrament: for when the minister dipping the infant in water, or laying water upon the face of it (as the manner also is) hath pronounced these words, ‘I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost,’ the infant is fully and perfectly baptized. So as the sign of the cross being afterwards used, doth neither add anything to the virtue and perfection of baptism, nor being omitted doth detract anything from the effect and substance of it.

“Secondly. It is apparent in the Communion Book, that the infant baptized is, by virtue of baptism, before it be signed with the sign of the cross, received into the congregation of Christ’s flock as a perfect member thereof, and not by any power ascribed unto the sign of the cross. So that for the very remembrance of the cross, which is very precious to all them that rightly believe in Jesu Christ, and in the other respects mentioned, the Church of England hath retained still the sign of it in baptism: following therein the Primitive and Apostolical Churches, and accounting it a lawful outward ceremony and honourable badge, whereby the infant is dedicated to the service of Him that died upon the cross, as by the words used in the Book of Common Prayer it may appear.

“Lastly, The use of the sign of the cross in baptism, being thus purged from all Popish superstition and error, and reduced in the Church of England to the primary institution of it, upon those true rules of doctrine concerning things indifferent, which are consonant to the word of God, and the judgments of all the ancient fathers, we hold it the part of every private man, both minister and other, reverently to retain the true use of it pre-

scribed by public authority, considering that things of themselves indifferent, do in some sort alter their natures, when they are either commanded or forbidden by a lawful magistrate, and may not be omitted at every man's pleasure contrary to the law, when they be commanded, nor used when they are prohibited."

By the Rubric at the beginning of the office of private baptism, it is provided in substance that the curates of every parish shall warn the people that without great cause and necessity they procure not their children to be baptized at home in their houses. Baptism at home.

By Canon 69 of 1603, "If any minister being duly, without manner of collusion, informed of the weakness and danger of death of any infant unbaptized in his parish, and thereupon desired to go or come to the place where the said infant remaineth, to baptize the same, shall either wilfully refuse so to do, or of purpose or of gross negligence shall so defer the time, as, when he might conveniently have resorted to the place, and have baptized the said infant, it dieth, through such his default unbaptized, the said minister shall be suspended for three months, and before his restitution shall acknowledge his fault, and promise before his ordinary, that he will not wittingly incur the like again. Provided that where there is a curate or substitute, this constitution shall not extend to the parson or vicar himself, but to the curate or substitute present." Canon 69.

Rubr. "The child being named by some one that is present, the minister shall pour water upon it, saying the baptismal formula. . . ."

"And let them not doubt but that the child so baptized is lawfully and sufficiently baptized, and ought not to be baptized again. Yet nevertheless, if the child which is after this sort baptized do afterward live, it is expedient that it be brought into the church, to the intent that the congregation may be certified of the true form of baptism privately before administered to such child." Office of private baptism.

By a provincial constitution women, when their time of child-bearing is near at hand, shall have water ready for baptizing the child in case of necessity (*h*). And for cases of necessity, the priests on Sundays were enjoined frequently to instruct their parishioners in the form of baptism (*i*). Which form was to be thus: I crysten the in the name of the Fader, and of the Sone, and of the Holy Goste (*k*). Lay baptism. Old constitutions.

Infants baptized by laymen or women (in imminent danger of death) shall not be baptized again: and the priest shall afterwards supply the rest (*l*).

If a child shall be baptized by a lay person at home by reason of necessity, the water (for the reverence of baptism) shall be either poured into the fire or carried to the church to be put in

(*h*) Lind. p. 63.

(*i*) Otho. Athon, p. 10.

(*k*) Lind. p. 245.

(*l*) Lind. p. 41.

the font; and the vessel shall be burnt or applied to the uses of the church (*m*).

Prayer Books
of Edward VI.

By the Rubrics of the Prayer Books of the 2nd and of the 5th Edward VI. it was ordered to the following effect: The pastors and curates shall often admonish the people, that without great cause and necessity they baptize not children at home in their houses; and when great need shall compel them so to do, that then they minister it on this fashion: First, let them that be present call upon God for his grace, and say the Lord's Prayer, if the time will suffer; and then one of them shall name the child, and dip him in the water, or pour water upon him, saying these words, I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.

Convocation,
1575.

In the manuscript copy of the articles made in convocation in the year 1575, the twelfth is, "Item, Where some ambiguity and doubt hath risen among divers, by what persons private baptism is to be administered; forasmuch as by the Book of Common Prayer allowed by the statute, the bishop of the diocese is authorized to expound and resolve all such doubts as shall arise, concerning the manner, how to understand, and to execute the things contained in the said book; it is now, by the said archbishop and bishops expounded and resolved, and every of them doth expound and resolve, That the said private baptism, in case of necessity, is only to be ministered by a lawful minister or deacon called to be present for that purpose, and by none other. And that every bishop in his diocese, shall take order, that this exposition of the said doubt shall be published in writing, before the first day of May next coming, in every parish church of his diocese in this province: And thereby all other persons shall be inhibited to intermeddle with the ministering of baptism privately, being no part of their vocation."

This article was not published in the printed copy; but whether on the same account that the fifteenth article was left out (namely, because disapproved by the crown) does not certainly appear. However the ambiguity remained, till the conference at Hampton Court, in which the king said, that if baptism was termed private, because any but a lawful minister might baptize, he utterly disliked it, and the point was there debated; which debate ended in an order to the bishops to explain it, so as to restrain it to a lawful minister.

Prayer Book
of James.

Accordingly, in the Book of Common Prayer, which was set forth in the same year, the alterations were printed in the rubric thus: "And also they shall warn them, that without great cause and necessity they procure not their children to be baptized at home in their houses. And when great need shall compel them so to do, then baptism shall be administered on this fashion: First, let the lawful minister and them that be present call upon God for his grace, and say the Lord's Prayer,

if the time will suffer; and then the child being named by some one that is present, the said lawful minister shall dip it in the water, or pour water upon it." And other expressions in other parts of the service, which seemed before to admit of lay baptism, were so turned as expressly to exclude it (*n*).

Nevertheless, Bishop Fleetwood says, that lay baptism is not declared invalid by any of the offices or rubrics, nor in any public act has the church ever ordered such as have been baptized by lay hands to be rebaptized by a lawful minister, though at the time of the Restoration there were supposed to be in England and Wales 200,000 or 300,000 souls baptized by such as are called lay hands. He says, whether the indispensable necessity of baptism be the doctrine of the Church of England or no, he cannot with certainty determine; but because he is persuaded that the church does not hold lay baptism to be invalid, he is so far persuaded that the church holds baptism to be indispensably necessary where it can possibly be had, and will have lay baptism (when a lawful minister cannot be had) rather than none at all (*o*).

Bishop
Fleetwood.

By the older canon law baptism is regularly confined to priests; but in cases of necessity, laymen and even women were allowed to perform the ceremony. *Baptizandi autem cura ad solos sacerdotes pertinet, ejusque ministerium nec ipsis diaconis explere permittitur, absque episcopo vel presbytero: nisi his procul absentibus, ultima languoris cogat necessitas: quo casu et laicis fidelibus, atque ipsis mulieribus baptizare permittitur* (*p*).

Older canon.
law.

Giannone, speaking of the latter part of the third century, remarks that it was the custom of these days, for persons of rank and consideration to adopt the very pernicious habit of deferring their baptism till the eve of their exposure to some great and unusual peril, or till the latter days of their life; in other words, they remained Catechumens till the near approach of one of these two events. After mentioning that it was a matter of historical notoriety that such had been the case with Constantine, and inferring from this fact the falsity of the claims of the Roman Church to that territory which they asserted had been granted by the emperor at his baptism, he gives these reasons for the prevalence of this custom: "People imagined that by deferring their baptism till the last moments of their existence, they thereby not only escaped the rigorous severities which in these days the church enjoined upon Christian penitents, but moreover that this procrastination of their baptism gave them a greater security for the eternal welfare of their souls. Because, as any one might administer this sacrament, even an infidel, neophyte or harlot, as the matter of it being water was always at hand, and as the form was simple and couched in very few words, he would indeed be the most

Giannone.

(*n*) Gibs. p. 369.

(*o*) Fleetwood's Works, p. 530.

(*p*) Inst. Juris. Can. II. 3; X. iii. 42. See also Lind. 50.

unfortunate of men who should meet with so sudden a death as not to be allowed sufficient time for the application of these healing waters, which through the infinite merits of Christ would in an instant cleanse him from the pollutions contracted in this mortal life, and at once and infallibly transport him into the happiness of another, immortal and eternal" (g).

The Roman Church undeniably held the doctrine that baptism with water and invocation of the Trinity might be administered by anybody (r). Many eminent writers, and amongst them the learned Bingham, are of opinion that the Anglican Church has always said "*fieri non debet, factum valet.*"

*Kemp v.
Wickes.*

The whole question underwent an elaborate discussion in the case of *Kemp v. Wickes* (s), in which Sir J. Nicholl held that a child baptized by a Dissenter, with water and the invocation of the Trinity, was baptized in the sense of the rubric to the burial service, and of the 68th canon, and therefore that the burial of such child was obligatory on the clergyman. It is hardly necessary to say that the canons, being promulgated in 1603, before the legal existence of Dissenters, could have had, at the period of their enactment, no reference to that body, and it would seem that a baptism performed by lay hands, in the case of an imminent emergency, was that which was contemplated by the canon in question. The question was again mooted in *Mastin v. Escott* in 1841; and the case which began in the Arches Court was appealed to the Judicial Committee of the Privy Council. Both courts confirmed the law laid down in *Kemp v. Wickes* (t).

*Mastin v.
Escott.*

Dr. Lawrence's opinion, that a clergyman is bound to baptize the child of a Dissenter.

In 1806, Dr. Lawrence, a very eminent civilian, was consulted as to whether a clergyman was bound to baptize the child of a Dissenter, knowing that such child was to be brought up in dissent from the doctrines of the Church of England. To this question the following opinion was returned:—

"By the 68th canon, any minister who shall refuse or delay to christen any child brought to him on Sundays or holydays, after due notice, is liable to be suspended from his ministry for three months. The phrase 'any child' is general. There is no distinction of parishioners who frequent the church or any other place of divine worship. The reasons given by the clergyman himself in this case might be easily shown to be weak and

(g) Giannone, *Istoria Civile di Napoli* lib. 2, c. 4, s. 1. He says Tasso alluded to this custom in his description of Clorinda's death:—

"A me, che le fui servo, e con sincera
Mente l' amai, ti diè non battezzata;
Nè già poteva allor battesimo darti,
Che l' uso nol sostien di quelle parti."—

La Gerusalemme liberata, Canto 12.

(r) Many authorities are referred to in Sir Herbert Jenner's judgment in *Mastin v. Escott*, 2 Curt. p. 700.

(s) 3 Phillim. p. 276.

(t) *Mastin v. Escott*, 2 Curt. p. 692; 1 N. of C. p. 552; 4 Moo. P. C. C. p. 104; also a Special Report by Dr. Curteis.

fallacious. But the authority of the law is clear and express on this point. The objection would of course be much stronger against the children of papist recusants (that is, of persons convicted by law of being Papists), than of those parents supposed to be Protestant Dissenters. Yet by the 3 Jac. 1, c. 5, s. 14 (*u*), all popish recusants are compelled to bring their children to be baptized by a lawful minister in the parish church.

“Doctors Commons, July 14, 1806.”

“F. LAWRENCE.

Preface to the Book of Common Prayer.] “It was thought convenient, that some prayers and thanksgivings, fitted to special occasions, should be added . . . particularly . . . an office for the baptism of such as are of riper years, which, although not so necessary when the former book was compiled, yet by the growth of anabaptism through the licentiousness of the late times crept in amongst us, is now become necessary, and may be always useful for the baptizing of natives in our plantations, and others converted to the faith.”

Baptism of those of riper years.

Rubric. “When any such persons, as are of riper years are to be baptized, timely notice shall be given to the bishop, or whom he shall appoint for that purpose, a week before at the least, by the parents or some other discreet persons; that so due care may be taken for their examination, whether they be sufficiently instructed in the principles of the Christian religion, and that they may be exhorted to prepare themselves with prayers and fasting for the receiving of this holy sacrament.

“And if they shall be found fit, then the godfathers and godmothers, (the people being assembled upon the Sunday or holy-day appointed,) shall be ready to present them at the font immediately after the second lesson, either at morning or evening prayer, as the curate in his discretion shall think fit.

“And it is expedient that every person thus baptized should be confirmed by the bishop so soon after his baptism as conveniently may be, that so he may be admitted to the holy communion.”

The case of *Gorham v. The Bishop of Exeter* (*x*) was that of a clergyman beneficed in the diocese of Exeter, who, on his presentation to a benefice of greater value, was refused admission by the bishop on account of certain views which he appeared, on examination, to hold on the subject of regeneration in baptism; but who on appeal obtained, by order of the Privy Council, institution to the benefice from the Dean of the Arches. The case has been already mentioned in considering the question of proceedings by *duplex querela* (*y*). It was, as is there said, a most peculiar case. What was the exact view which Mr. Gorham held it is very difficult to discover. The doctrine which the Privy Council extracted from his answers given to the bishop was this:

Gorham v. Bishop of Exeter.

(*u*) Now repealed.

(*x*) Moore's Special Report.

(*y*) Vide *supra*, p. 331.

but that the grace of regeneration does not so necessarily accompany the act of baptism, that regeneration invariably takes place in baptism; that the grace may be granted before, in, or after baptism; that baptism is an effectual sign of grace, by which God works invisibly in us, but only in such as worthily receive it—in them alone it has a wholesome effect; and that without reference to the qualification of the recipient, it is not in itself an effectual sign of grace. That infants baptized, and dying before actual sin, are certainly saved; but that in no case is regeneration in baptism unconditional.”

This case, therefore, will be found on examination not to support the view sometimes erroneously entertained of it, as deciding that it is competent for a clergyman of the Church of England to hold, nakedly and without qualification, that infant children are not regenerated by virtue of the sacrament of baptism.



SECT. 2.—*Registration of Baptism.*

Of registers
in general.

The keeping of a church book for the age of those that should be born and christened in the parish began in the thirtieth year of King Henry the Eighth (z).

And the following canon, in the main of it, was only a reinforcement of one of the Lord Cromwell's injunctions in the year 1538, which was continued in those of King Edward the Sixth and of Queen Elizabeth, in whose reign a protestation being appointed to be made by ministers at institution, one head of it was—I shall keep the register book, according to the Queen's Majesty's injunctions (a).

Canon 70.

By Can. 70, of 1603, “In every parish church and chapel within this realm shall be provided one parchment book at the charge of the parish, wherein shall be written the day and year of every christening, wedding, and burial which have been in the parish since the time that the law was first made in that behalf, so far as the ancient books thereof can be procured, but especially since the beginning of the reign of the late Queen. And for the safe keeping of the said book, the churchwardens, at the charge of the parish, shall provide one sure coffer with three locks and keys; whereof one to remain with the minister, and the other two with the churchwardens severally, so that neither the minister without the two churchwardens, nor the churchwardens without the minister, shall at any time take that book out of the said coffer. And henceforth upon every Sabbath day, immediately after morning or evening prayer, the minister and churchwardens shall take the said parchment book out of

(z) God. 144, 145; 3 Burnet, (a) Gibs. p. 204.
Hist. Reform, p. 139.

the said coffer, and the minister, in the presence of the churchwarden shall write and record in the said book the names of all persons christened, together with the names and surnames of their parents, and also the names of all persons married and buried in that parish in the week before, and the day and year of every such christening, marriage, and burial; and that done, they shall lay up that book in the coffer as before, and the minister and churchwardens unto every page of that book, when it shall be filled with such inscriptions, shall subscribe their names. And the churchwardens shall once every year, within one month after the five and twentieth day of March, transmit unto the bishop of the diocese, or his chancellor, a true copy of the names of all persons christened, married, or buried in their parish in the year before (ended the said five and twentieth day of March), and the certain days and months in which every such christening, marriage, and burial was had, to be subscribed with the hands of the said minister and churchwardens, to the end the same may faithfully be preserved in the registry of the said bishop; which certificate shall be received without fee. And if the minister or churchwardens shall be negligent in performance of any thing herein contained, it shall be lawful for the bishop or his chancellor to convent them, and proceed against every of them as contemnors of this our constitution."

The previous regulations upon this subject of 6 & 7 Will. 3, 52 Geo. 3, c. 6; 9 & 10 Will. 3, c. 35, s. 4; 26 Geo. 2, c. 33, are merged c. 146. in the present Act, 52 Geo. 3, c. 146.

This Act is repealed as far as it relates to the registration of marriages, but the registration of baptisms and burials is not affected by any subsequent enactment.

It provides as follows:—

Sect. 1. "Registers of public and private baptisms, . . . and burials solemnized according to the rites of the united church of England and Ireland, within all parishes or chapelries in England, whether subject to the ordinary, or peculiar, or other jurisdiction, shall be made and kept by the rector, vicar, curate or officiating minister of every parish, (or of any chapelry where the ceremonies of baptism, . . . and burial have been usually and may according to law be performed) for the time being, in books of parchment, or of good and durable paper, to be provided by his Majesty's printer as occasion may require, at the expense of the respective parishes or chapelries, whereon shall be printed upon each side of every leaf the heads of information herein required to be entered in the registers of baptisms, . . . and burials respectively, and every such entry shall be numbered progressively from the beginning to the end of each book, the first entry to be distinguished by number 1; and every such entry shall be divided from the entry next following by a printed line, according to the forms contained in the schedules (A.), . . . (C.), hereto annexed; and every page of every such book shall be numbered with progressive numbers, the

Officiating ministers to keep registers of public and private baptisms, of marriages and of burials.

Parishes to provide suitable books for that purpose.

first page being marked with the number 1 in the middle of the upper part of such page, and every subsequent page being marked in like manner with progressive numbers, from number 1 to the end of the book.”

SCHEDULE (A).

1.					
<i>BAPTISMS solemnized in the Parish of St. A. in the County of B. in the Year One thousand eight hundred and thirteen.</i>					
When Baptized.	Child's Christian Name.	Parents' Name.		Abode.	Quality, Trade or Profession.
		Christian.	Surname.		
1813. 1st Feb. No. 1.	John Son of	William Elizabeth		Lambeth	
3rd March. No. 2.	Ann Daughter of	Henry Martha		Fulham	

King's printer to transmit to each parish a printed copy of act, and register books adapted to forms prescribed.

Sect. 2. “A printed copy of this Act, together with one book so prepared as aforesaid, and adapted to the form of the register of baptisms prescribed in the schedule (A.) to this Act annexed; . . . and also one other book so prepared as aforesaid, and adapted to the form prescribed for the register of burials in the schedule (C.) to this act annexed, shall, as soon as conveniently may be after the passing of this act, be provided and transmitted by his Majesty's printer to the officiating ministers of the several parishes and chapelries in England respectively, who are hereby required to use and apply the same in and to the purposes of this act; and such books respectively shall be proportioned to the population of the several parishes and chapelries, according to the last returns of such population made under the authority of Parliament; and other books of like form and quality shall for the like purposes be furnished from time to time by the churchwardens or chapelwardens of every parish or chapelry, at the expense of the said parish or chapelry, whenever they shall be required by the rector, vicar, curate, or officiating minister to provide the same; and all such books shall be of paper, unless required to be of parchment by such churchwardens or chapelwardens respectively.”

Registers in separate register books.

Sect. 3. “Such registers shall be kept in such separate books aforesaid; and every such rector, vicar, curate or officiating minister shall, as soon as possible after the solemnization of every baptism, whether private or public, or burial respectively, record and enter in a fair and legible handwriting, in the proper

register book to be provided, made and kept as aforesaid, the several particulars described in the several schedules hereinbefore mentioned, and sign the same; and in no case, unless prevented by sickness or other unavoidable impediment, later than within seven days after the ceremony of any such baptism or burial shall have taken place."

Sect. 4. "Whenever the ceremony of baptism or burial shall be performed in any other place than the parish church or churchyard of any parish, or the chapel or chapel yard of any chapelry, providing its own distinct registers, and such ceremony shall be performed by any minister not being the rector, vicar, minister, or curate of such parish or chapelry, the minister who shall perform such ceremony of baptism or burial shall, on the same or on the next day, transmit to the rector, vicar, or other minister of such parish or chapelry, or his curate, a certificate of such baptism or burial in the form contained in the schedule (D.) to this act annexed, and the rector, vicar, minister, or curate of such parish or chapelry, shall thereupon enter such baptism or burial according to such certificate in the book kept pursuant to this act for such purpose; and shall add to such entry the following words, 'According to the certificate of the Reverend ——— transmitted to me on the ——— day of ———.'"

Certificate of baptism, &c. when performed in other place than parish church, &c. according to schedule (D.), entry of baptism, &c. distinguished accordingly.

SCHEDULE (D.)

"I ——— do hereby certify, that I did on the ——— day of ——— baptize, according to the rites of the Church of England, ——— son [or 'daughter'] of ——— and ——— his wife, by the name of ———
To the Rector [or, as the case may be,] of ———"

Sect. 6. "At the expiration of two months after the end of every . . . year, fair copies of all the entries of the several baptisms, . . . and burials, which shall have been solemnized or shall have taken place within the year preceding, shall be made by the rector, vicar, curate or other resident or officiating minister (or by the churchwardens, chapelwardens, clerk or other person duly appointed for the purpose, under and by the direction of such rector, vicar, curate, or other resident or officiating ministers) on parchment, in the same form as prescribed in the schedules hereunto annexed (to be provided by the respective parishes), and the contents of such copies shall be verified and signed in the form following, by the rector, vicar, curate, or officiating minister of the parish or chapelry to which such respective register book shall appertain:—

Annual copies of registers made; and verified by officiating minister.

'I, A. B., Rector [or, as the case may be,] of the parish of C. [or, "of the chapelry of D."'] in the county of E., do hereby solemnly declare, that the several writings hereto annexed, purporting to be copies of the several entries contained in the several register books of baptisms, . . . and burials of the parish or chapelry aforesaid, from the ——— day of ——— to the ——— day of ———, are

true copies of all the several entries in the said several register books respectively from the said — day of — to the said — day of — ; and that no other entry during such period is contained in any of such books respectively, — are truly made according to the best of my knowledge and belief.

‘Signed

A. B.’

Which declaration shall be fairly written, without any stamp, on the said copy immediately after the last entry therein ; and the signature to such declaration shall be attested by the churchwardens or chapelwardens, or one of them, of the parish or chapelry to which such register books shall belong.”

Annual copies of register books transmitted to registrar of diocese.

Sect. 7. “Copies of the said register books, verified and attested as aforesaid, shall, whether such parish or chapelry shall be subject to the ordinary, peculiar, or other jurisdiction, be transmitted by such churchwardens or chapelwardens, after they, or one of them, shall have signed the same, by the post, to the registrars of each diocese in England within which the church or chapel shall be situated, on or before the 1st day of June, 1814, and on or before the 1st day of June in every subsequent year.”

Sect. 8 enjoins registrars to report to bishops whether copies of the registers had been sent in.

Officiating minister neglecting to verify copies of register books, churchwardens to certify default.

Sect. 9. “In case the rector, vicar, or other officiating minister or curate of any parish or chapelry shall neglect or refuse to verify and sign such copies of such several register books, and such declaration as aforesaid, so that the churchwardens or chapelwardens shall not be able to transmit the same, as required by this act, such churchwardens or chapelwardens shall, within the time required by this act for the transmission thereof, certify such default to the registrar of the diocese within which such parish or chapelry shall be, who shall specially state the same in his report to the bishop of such diocese.”

Places where no church, &c. memorandum of baptisms, &c. delivered to officiating minister of adjoining parish.

Sect. 10. “In all cases of the baptism of any child, or the burial of any person in any extra-parochial place in England, according to the rites of the Established Church, where there is no church or chapel, it shall be lawful for the officiating minister, within one month after such baptism or burial, to deliver to the rector, vicar, or curate of such parish immediately adjoining to the place in which such baptism or burial shall take place, as the ordinary shall direct, a memorandum of such baptism or burial, signed by such parent of the child baptized, or a memorandum of such burial, signed by the person employed about the same, together with two of the persons attending the same, according as the nature of the case may respectively require ; and every such memorandum respectively shall contain all such particulars as are hereinbefore required ; and every such memorandum delivered to the rector, vicar, or curate of any such adjoining parish or chapelry, shall be entered in the register of his parish, and form a part thereof.”

Sect. 11 provides that letters, &c., containing annual copies of register books addressed in the form given in schedule E., shall go free of postage. This schedule is thus :—

Letters free
of postage.

*To the Registrar of the diocese of —
at —*

A. B. } Churchwardens [*or* “chapelwardens”] of the parish
C. D. } [*or* “chapelry”] of — [*or such other description as
the case may require*].

Sect. 12. “When and so often as the copies of the said register books of baptisms, . . . and burials as aforesaid, and also the said lists of births, baptisms, . . . or burials as aforesaid, shall be transmitted to the office of the said registrars respectively, as aforesaid, pursuant to the directions hereinbefore contained for that purpose, the said registrars shall respectively cause all the said books and lists to be safely and securely deposited, kept, and preserved from damage or destruction by fire or otherwise, and to be carefully arranged for the purpose of being resorted to as occasion may require; and the said registrars respectively shall also cause correct alphabetical lists to be made and kept in books suitable to the purpose, of the names of all persons and places mentioned in such books and lists as shall have been transmitted to the said registrars respectively; which alphabetical lists and books, and also the copies of registers and lists so transmitted to the said registrars as aforesaid, shall be open to public search at all reasonable times on payment of the usual fees.”

Annual copies
of register
books when
transmitted to
registrars,
kept from
damage.

Alphabetical
lists.

Sect. 14 provided for the punishment of persons forging or altering entries in the register.

This section has been since repealed, and the present law is contained in 24 & 25 Vict. c. 98, s. 36, and is as follows :—

24 & 25 Vict.
c. 98.

“Whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced or injured, any register of births, baptisms, marriages, deaths, or burials which now is or hereafter shall be by law authorized or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, or shall forge or fraudulently alter in any such register any entry relating to any birth, baptism, marriage, death, or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or shall knowingly and unlawfully insert or cause or permit to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and unlawfully give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing such writing, or the part of such register whereof such copy or extract shall be so given, to be false in any material particular, or shall

Punishment
for destroy-
ing, forging
or altering
register, or
for making
false entry
therein, or
giving false
certificates,
&c.

forge or counterfeit the seal of or belonging to any register office or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged or altered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

52 Geo. 3,
c. 146.

Fees hereto-
fore payable.

Proviso for.

Application
of penalties.

Act to extend
to churches
(cathedral and
collegiate)
and chapels
not parochial.

52 Geo. 3, c. 146, proceeds to enact as follows:—

Sect. 16. "Nothing in this act contained shall in any manner diminish or increase the fees heretofore payable or of right due to any minister for the performance of any of the before-mentioned duties, or to any minister or registrar for giving copies of such registrations, but all due, legal and accustomed fees on such occasions, and all powers and remedies for recovery thereof, shall be and remain as though this act had not been made" (*b*).

Sect. 18. "One half of the amount of all fines or penalties to be levied in pursuance of this act shall go to the person who shall inform or sue for the same; and the remainder of such fines as shall be imposed on any churchwarden or chapelwarden shall go to the poor of the parish or place for which such churchwarden or chapelwarden shall serve, and the remainder of such fines as shall be imposed on any rector, vicar, minister, or curate, or registrar, shall be paid and applied to such charitable purposes, in the county within which the parish or place shall be, as shall be appointed and directed by the bishop of the diocese."

Sect. 20. "All and every the provisions in this act shall extend, so far as circumstances will permit, to cathedral and collegiate churches, and chapels of colleges or hospitals, and the burying grounds belonging thereto: and to the ministers who shall officiate in such cathedral or collegiate churches, and chapels of colleges or hospitals, and burying grounds respectively, and shall baptize, . . . or bury any person or persons, although such cathedral or collegiate churches or chapels of colleges or hospitals, or the burying grounds belonging thereto, may not be parochial, or the ministers officiating therein may not be as such parochial ministers, and there shall be no churchwarden or churchwardens thereof; and in all such cases, the books hereinbefore directed to be provided, shall be provided at the expense of the body having right to appoint the officiating minister in every such cathedral or collegiate church or chapel of a college or hospital; and copies thereof shall be transmitted to the registrar of the diocese, within which such cathedral or collegiate church or chapel of a college or hospital shall be, by the officiating minister of such church, in like manner as is

herein directed with respect to parochial ministers, and shall be attested by two of the officers of such church, college, or hospital, as the copies of parochial registers are herein directed to be attested by churchwardens."

In the case of *Dormer v. Ekyns* an information was moved for in the Court of King's Bench against Mr. Ekyns, rector of the parish church of Walton, and against Mr. Bonner, curate of the same church, for refusing to give Mr. Dormer copies of certain parts of a register belonging to that parish, and likewise for refusing to give him a certificate of certain persons of the family of the Dormers being born in that parish. In support of the motion it was said, that an ejectment was depending in the court at the time this refusal was made, and still continued to be so, between Mr. Dormer and Mr. Parkerson and his wife, concerning certain lands which the plaintiff claimed as heir male of the Dormer family. Several of that family were born in the parish of Walton; and for that reason it was necessary to have copies of several parts of the register, and likewise a certificate of the birth of many in that family. Accordingly Mr. Dormer made his application to the rector and curate of that parish for this purpose, and offered to pay them for the same; but they refused letting him have them; and the only reason they gave was, that Mr. Parkerson and his wife were the defendants, and they would do nothing to their prejudice. The court said, you have a right to inspect the public books of the parish; but cannot oblige the rector or curate to make you out either copies of those books, or a certificate; for which reason they could not grant the motion. Upon this, counsel desired a rule to inspect those books. The court said: Motions to inspect the public books of corporations, they grant without an affidavit; but on motions to inspect the public books of a parish, an affidavit is always requisite. By such affidavit, they said, too, it must be sworn, that the copies of them are necessary to be produced in evidence at a trial of a cause depending, and likewise that the inspection of those books to take copies has been demanded and refused. Now in the present case, the first part was sworn to, but not the latter; for which reason the court refused to make any rule at present (*c*).

Parish registers are public books.

An entry in the register of the christening of a child, as to the time of its birth, is not of itself sufficient evidence of the age (*d*). If a parish register of baptisms state that the person baptized was born on a particular day, that is not evidence of the date of his birth (*e*). A register of baptisms is not *per se* evidence of the place of birth of the party baptized (*f*); nor is a certificate of marriage evidence unless it be shown as a copy of the parish register. But where, in an action to recover damages for criminal conversation with the plaintiff's wife, the

How far evidence.

(*c*) 2 Barn. K. B. p. 269.

p. 29.

(*d*) *When v. Law*, 3 Stark. p. 63.

(*f*) *Rea v. North Petherton*, 5 B.

(*e*) *Rea v. Clapham*, 4 C. & P.

& C. p. 508; 8 D. & R. p. 325.

proof of the marriage was an examined copy of the marriage register, and the person who examined the copy with the original register being acquainted with the handwriting of the plaintiff and his wife, stated that the signatures to the register were in their handwriting, it was held sufficient evidence to prove the identity of the parties to the marriage (*g*). A baptism cannot be proved by a minute written at the time by the parish clerk, nor by an entry in the parish register made at a subsequent period by a succeeding incumbent, founded only upon such minute (*h*). And it seems doubtful whether a parish register not kept according to the canon (*i*), which requires weekly entries, or whether a copy, without proof that the original cannot be found, would be admitted in evidence (*k*). And a copy of a register of baptism in the island of Guernsey has been held to be insufficient evidence of a person's majority (*l*). But a parish register has been received as evidence notwithstanding the loss of a leaf, which did not destroy the series of entries (*m*). Such registers are considered for certain purposes as public books, and persons interested in them have a right to inspect and take copies of such parts of them as relate to their interest (*n*).

Custody of.
52 Geo. 3,
c. 146.

52 Geo. 3, c. 146, enacts by sect. 5, that "The several books wherein such entries shall respectively be made, and all register books heretofore in use, shall be deemed to belong to every such parish or chapelry respectively, and shall be kept by and remain in the power and custody of the rector, vicar, curate or other officiating minister of each respective parish or chapelry as aforesaid, and shall be by him safely and securely kept in a dry, well-painted iron chest, to be provided and repaired as occasion may require, at the expense of the parish or chapelry, and which said chest containing the said books shall be constantly kept locked in some dry, safe and secure place within the usual place of residence of such rector, vicar, curate or other officiating minister, if resident within the parish or chapelry, or in the parish church or chapel; and the said books shall not, nor shall any of them, be taken or removed from or out of the said chest, at any time or for any cause whatever, except for the purpose of making such entries therein as aforesaid, or for the inspection of persons desirous to make search therein, or to obtain copies from or out of the same, or to be produced as evidence in some court of law or equity, or to be inspected as to the state and condition thereof, or for some of the purposes of this act; and immediately after making such respective entries, or producing

(*g*) *Bain v. Mason*, 1 C. & P. 202; *Deane v. Thomas*, M. & M. p. 361.

(*h*) *Doe d. Warren v. Bray*, 3 M. & R. p. 428; 8 B. & C. p. 813.

(*i*) See *Rex v. Bramley*, 6 T. R. p. 330.

(*k*) *Walker v. Wingfield*, 18 Ves.

p. 443.

(*l*) *Huet v. Le Mesurier*, 1 Cox, p. 275.

(*m*) *Walker v. Wingfield*, 18 Ves. p. 443.

(*n*) See *Geery v. Hopkins*, 2 Ld. Raym. p. 851; *Warriner v. Giles*, 2 Stra. p. 954.

the said books respectively for the purposes aforesaid, the said books shall forthwith again be safely and securely deposited in the said chest."

By the Stamp Act (54 & 55 Vict. c. 39), schedule, the following duty is imposed:—

"Copy or extract" (certified) of or from any register
of births, baptisms, marriages, deaths or burials 0 0 1

Stamp duty
on extracts.

Exemptions.

(1.) Copy or extract furnished by any clergyman, registrar, or other official person pursuant to and for the purposes of any act of parliament, or furnished to any general or superintending registrar under any general regulation.

(2.) Copy or extract for which the person giving the same is not entitled to any fee or reward.

By sect. 64, "The duty upon a certified copy or extract of or from any register of births, baptisms, marriages, deaths or burials is to be paid by the person requiring the copy or extract, and may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the copy or extract is signed before he delivers the same out of his hands, custody or power."

Duty—by
whom to be
paid, and may
be denoted
by adhesive
stamp.

Before the establishment of a national civil registration by 6 & 7 Will. 4, c. 86, neither in the ecclesiastical nor in the temporal courts were copies of registries of dissenting chapels, or of records not preserved in legally recognized official custody, allowed to be pleaded as evidence. Sir John Nicholl said, "The books themselves, however, may be produced at the hearing of the cause (*o*) and made evidence to a certain extent." The temporal courts, on the other hand, had refused in several instances to allow the birth of a child or the death of a person to be proved from the registers of dissenters (*p*).

Non-parochial
registers.

Whether ad-
missible in
evidence.

The great inconvenience resulting from this rule of law caused a commission to be issued in 1836, for the purpose of ascertaining what remedy might best be applied to the evil. The history of the commission, and the very curious fruit of their investigation, will be found in their report laid before parliament on the 18th of June, 1838, which produced on the 10th of August, 1840, the statute of 3 & 4 Vict. c. 92. This act, after reciting the object of the commission, and the nature of its report, proceeds to enact as follows:—

3 & 4 Vict.
c. 92.

"The registrar-general of births, deaths, and marriages in England shall receive, and deposit in the general register office, all the registers and records of births, baptisms, deaths, burials, and marriages now in the custody of the commissioners appointed by her Majesty as aforesaid, and which they have by

Certain re-
gisters to be
deposited in
the custody of
the registrar-
general.

(*o*) *Newman v. Raitby*, 1 Phillim.
p. 315.

(*p*) *Ex parte Taylor*, 1 J. & W.
p. 483; *Whittuch v. Waters*, 4 C. &
P. p. 375.

their said report recommended to be kept in some secure place of deposit, and also the several registers and records mentioned in the schedules (H), (I), (P) and (Q), annexed to the said report of the said commissioners, and also such other registers as are hereinafter directed to be deposited with him."

By sect. 2 the commissioners were continued for a year, and were enabled to certify further registers and records to be received and deposited in the same way.

Lists to be made ;

which with registers and records shall be open to search ;

and certified extracts may be had therefrom.

Registers deemed in legal custody, and shall be receivable in evidence.

Sect. 5. "The registrar general shall cause lists to be made of all the registers and records which may be placed in his custody by virtue of this act ; and every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said lists, and any register or record therein mentioned, . . . and to have a certified extract of any entry in the said registers or records, and for every search in any such register or record shall be paid the sum of one shilling, and for every such certified extract the sum of two shillings and sixpence, and no more."

Sect. 6. "All registers and records deposited in the general register office by virtue of this act, except the registers and records of baptism and marriages at the Fleet and King's Bench Prisons, at May Fair, at the Mint in Southwark (*q*) and elsewhere, which were deposited in the registry of the bishop of London in the year 1821, as hereinafter mentioned, shall be deemed to be in legal custody, and shall be receivable in evidence in all courts of justice, subject to the provisions hereinafter contained ; and the registrar-general shall produce, or cause to be produced, any such register or record, on subpoena or order of any competent court or tribunal, and on payment of a reasonable sum, to be taxed as the court shall direct, and to be paid to the registrar-general, on account of the loss of time of the officer by whom such register or record shall be produced, and to enable the registrar-general to defray the travelling and other expenses of such officer."

Sections 9 to 19 provide for the receipt of the registers or extracts therefrom as evidence in the several courts. Sect. 16, as to the ecclesiastical courts, is as follows :—

Certified extract to be used in ecclesiastical courts ;

and the judge may order the production of the original.

"In case any party shall intend to use in evidence in any ecclesiastical court, . . . any extract, certified as hereinbefore mentioned, he shall plead and prove the same in the same manner to all intents and purposes as if the same were an extract from a parish register, save and except that any such extract, certified as hereinbefore mentioned, shall be pleaded and received in proof without its being necessary to prove the collation of such extract with the original register or record : Provided always, that the judge of the court, on cause shown by any party to the suit (or of his own motion when the proceedings are *in pœnam*), may, after publication, issue a monition for the produc-

(*q*) These registers had never been received in evidence: *Read v. Passer*,

1 Esp. p. 213; 1 Peake, Ca. p. 303; *Doe v. Gatacre*, 8 C. & P. p. 578.

tion at the hearing of the cause of the original register or record containing the entry to which such certified extract relates."

By sect. 20, "The several registers and records of baptisms and marriages performed at the Fleet and King's Bench Prisons, at May Fair, and at the Mint in Southwark, and elsewhere, which were deposited in the registry of the Bishop of London in the year 1821, by the authority of one of his late majesty's principal secretaries of state, shall be transferred from the said registry to the custody of the registrar-general, who is hereby directed to receive the same for safe custody: Provided nevertheless, that none of the provisions hereinbefore contained respecting the registers and records made receivable in evidence by virtue of this act shall extend to the registers and records so deposited in the registry of the Bishop of London in the year 1821 as aforesaid."

Fleet and May
Fair registers,
&c.

On the 9th of August, 1841, the commissioners made their final report as provided for in the 2nd section.

By 21 & 22 Vict. c. 25, reciting that a second commission had been issued in the twentieth year of her Majesty to examine into non-parochial registers and records, and had received 292 such registers or records, of which they had certified 265 to be accurate and faithful, though in some cases only in parts thereof, the registrar-general is ordered (by sect. 1) to receive and deposit these registers and records; and (by sect. 3) they are made subject to all the provisions of 3 & 4 Vict. c. 92.

21 & 22 Vict.
c. 25.

By sect. 2, certain registers or records, sent in too late for the commissioners to report upon, are to be examined by three or more persons appointed by the secretary of state; and, if approved by them, are by sect. 3 to be treated in like manner with those previously mentioned.

Registers of births, baptisms, burials and marriages of British subjects beyond seas kept at British embassies and factories have been from time to time transmitted to the Registry of the Consistory Court of London and are there preserved (*r*).

Registers
abroad.

By the Act for registering Births, Deaths and Marriages in England, 6 & 7 Will. 4, c. 86, it is provided as follows:—

6 & 7 Will. 4,
c. 86.

Sect. 49. "Nothing herein contained shall affect the registration of baptisms, or burials as now by law established, or the right of any officiating minister to receive the fees now usually paid for the performance or registration of any baptism, burial, or marriage" (*s*).

Saving clause.

In lieu of the previous provisions in 6 & 7 Will. 4, c. 86, s. 24, and 1 Vict. c. 22, s. 2, it is enacted by sect. 8 of the Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88), as follows:—

37 & 38 Vict.
c. 88.

"When the birth of any child has been registered and the name, if any, by which it was registered is altered, or if it was registered without a name, when a name is given to it, the

Registration
of baptismal
name in
certain cases.

(*r*) See Report of the Commissioners of 1838; see, too, Taylor on

Evidence, 8th ed., ss. 1354, 1503, and notes.

(*s*) Vide infra, p. 509.

parent or guardian of such child, or other person procuring such name to be altered or given, may, within twelve months next after the registration of the birth, deliver to the registrar or superintendent registrar such certificate as hereinafter mentioned, and the registrar or superintendent registrar, upon the receipt of that certificate, and on payment of the appointed fee, shall, without any erasure of the original entry, forthwith enter in the register book the name mentioned in the certificate as having been given to the child, and, having stated upon the certificate the fact of such entry having been made, shall forthwith send the certificate to the Registrar General, together with a certified copy of the entry of the birth with the name so added.

"The certificate shall be in the form given in the First Schedule to this Act, or as near thereto as circumstances admit, and shall be signed by the minister or person who performed the rite of baptism upon which the name was given or altered, or, if the child is not baptized, shall be signed by the father, mother, or guardian of the child, or other person procuring the name of the child to be given or altered.

"Every minister or person who performs the rite of baptism shall deliver the certificate required by this section on demand, on payment of a fee not exceeding one shilling.

"The provisions of this section shall apply with the prescribed modifications in the case of births at sea, of which a return is sent to the Registrar-General of Births and Deaths in England."

"The form given in the above-mentioned schedule is as follows:—

"I — of — in the county of — do hereby certify, that on the —, 18—, I baptized by the name of — a — male child, produced to me by — as the — of —, and declared by the said — to have been born at — in the county of — on the — 18—.

"Witness my hand — 18.

"[Signed by officiating minister.]"

SECT. 3.—*No Fee for Baptism.*

Sacraments
not to be
denied for
want of fee.

It has always been a maxim of ecclesiastical law that no sacrament of the church shall be denied to any one upon the account of any sum of money, though it has been said that immemorial custom may in certain special cases (*s*) warrant the

(*s*) "Firmiter inhibemus, ne cuiquam pro aliqua pecunia denegetur, sepultura, vel baptismus, vel aliquod sacramentum ecclesiasticum, vel etiam matrimonium contrahendum impediatur. Quoniam si quid pia devotione fidelium

consuetum fuerit erogari, super hoc postmodum volumus per ordinarium loci ecclesiis justitiam fieri, sicut in generali concilio expressius est statutum. Absonum etiam iudicamus, quod de cætero pro christumate et oleo aliquid exigatur, vel

demand for a fee after the sacrament has been performed. In England, however, the exception to the general law with respect to baptism appears never to have been admitted (*t*).

In the case of *Burdeaux v. Lancaster*, Burdeaux, a French protestant, had his child baptized at the French church in the Savoy, and Dr. Lancaster, vicar of St. Martin's, in which parish it is, together with the clerk, libelled against him for a fee of 2s. 6d. due to him, and 1s. for the clerk. A prohibition was moved for, and it was urged, that this was an ecclesiastical fee due by the canon. By Holt, Chief Justice: Nothing can be due of common right, and how can a canon take money out of laymen's pockets? Lindwood says, it is simony to take anything for christening or burying, unless it be a fee due by custom; but then, a custom for any person to take a fee for christening a child when he doth not christen him, is not good; like the case in Hobart, where one dies in one parish and is buried in another, the parish where he dies shall not have a burying fee; if you have a right to christen, you should libel for that right, but you ought not to have money for christening when you do it not (*u*).

*Burdeaux v.
Lancaster.*

Now the Act 35 & 36 Vict. c. 36, after reciting as follows: 35 & 36 Vict.
c. 36.
“Whereas doubts have been entertained whether in certain churches and chapels of the Church of England as by law established, under the authority of certain local Acts of Parliament or custom, fees may not now be demanded for the administration of the sacrament of baptism, or for the due registration of such administration: And whereas it is expedient that such doubts should not exist”; enacts “That from and after the passing of this Act it shall not be lawful for the minister, clerk in orders, parish clerk, vestry clerk, warden, or any other person to demand any fee or reward for the celebration of the sacrament of baptism, or for the registry thereof: Provided always, that this Act shall not apply to the present holder of any office who may at the present time be entitled by any Act of Parliament to demand such fees.”

erogetur, cum toties hoc prohibitum reperiatur. Si quis verò contra hoc facere præsumpserit, Anathemate sit innodatus.” The gloss on *Erogari* is Sc. tempore ministrationis hujusmodi sacramentorum. Lind. p. 278.

(*t*) “By the ancient canons it was simony to take any thing for the sacraments of the church, because they ought to be administered freely. . . . And though some ministers have sued their parishioners for a fee due to them on baptism, yet I cannot find anything due for it by virtue of any custom or otherwise; And, therefore, when the curate of Bridlington, in York-

shire, libelled against his parishioner for a shilling, as due to him for baptizing his child, a prohibition was granted.” Ayl. Par. p. 106. By 13 & 14 Vict. c. 41 (The Parish of Manchester Division Act, 1850), s. 34, all fees for baptisms or registration of baptisms on any Sunday or holy day in the parish are expressly forbidden. A similar provision is made as to new parishes created under 6 & 7 Vict. c. 37, by s. 15. See also 14 & 15 Vict. c. 97, s. 17.

(*u*) 1 Salk. p. 332; Holt, p. 317; 12 Mod. p. 171. See *Topsall v. Ferrers*, Hob. 175.

CHAPTER III.

CATECHISM.

Origin of
word.

CATECHISM (*a*), or "*catechismus*," is derived from the Greek word "*κατηχεῖν*," signifying originally to sound a thing in the ear of the person spoken to, then to exhort and then to instruct. It is used in various significations in the New Testament (*b*). "In '*κατηχέω*,'" says Bishop Andrewes, "is included an iteration, and from '*ἡχέω*,' we have our word echo. '*Ἡχέω*' is indeed 'to sound the last syllable,' and such sounders haply there are enough; but '*κατηχέω*' is 'to sound in the whole after one again.' And such is the repetition which is required of the right and true '*κατηχούμενοι*,' young catechised Christians, and those places are called '*κατεχέεις*,' that give the whole verse or word again" (*c*).

To catechize is here understood in the ecclesiastical sense of giving elementary instruction in the Christian religion by the form of dialogue. The teacher is the catechist, the pupil the catechumen, the guide of instruction the catechism.

Catechists and
catechumens
in the primi-
tive church.

Catechists constituted no distinct order in the earliest ages of our church, but were chosen from the other orders for the purpose of instructing the catechumens in the first principles of religion, and thereby preparing them for the reception of baptism. The bishop himself sometimes performed this office, catechising on Palm Sunday such catechumens as were to be baptized on Easter-eve. At other times, presbyters and deacons performed this office. St. Chrysostom, while presbyter of Antioch, entitled one of his Homilies "*κατήχησις πρὸς τοὺς μέλλοντας φωτίζεσθαι*"—"*φωτιζόμενοι*," or the "illuminate," being one title by which Christians, whose education was complete and perfect, were discriminated from catechumens. Their other titles, *πιστοὶ*, *μεμυημένοι*, *τελείοι*, all answered the same end of distinguishing the faithful initiated perfect baptized from the comparatively uninitiated state of catechumens. These latter also bore several designations, such as "novitioli," "tyrones," &c. &c., all indicating that they were as yet but imperfect members of the church.

(*a*) Müller, *Lexicon des Kirchenrechts*, "Katechisiren," III. p. 329; Blunt, *Annotated Book of Common Prayer*, p. 241; Blunt, *Dictionary of Doctrinal and Historical Theology*, "Catechumen."

(*b*) Acts of Apostles, xviii. 25, xxi. 21; Rom. ii. 18; Gal. vi. 6.

(*c*) Pattern of Catechistical Doctrine; Introduction, Chap. I. sect. 10, p. 4.

In the apostolic age the interval was never long between conversion and baptism. The history of Cornelius, the Ethiopian Eunuch, Lydia, and the gaoler of Philippi, in the Acts of the Apostles, demonstrate that in those days catechizing and baptism immediately accompanied one another. In after ages the church, fearing to admit vicious members, or those whom persecution would render apostates, prolonged the interval, and provided that a prescribed course of discipline and instruction should be previously undergone. Thus Justinian enacts, in the 144th Novell, "*Per duos primum annos in fide instituantur, et pro viribus scripturas ediscant: tuncque demum sacro redemptionis offerantur baptismati.*" Another reason for late baptism was the prevalence of a persuasion in the third century, that if no sin intervened between baptism and death, salvation was secured to the baptized. Constantine was not baptized till a very brief period before his death, being influenced by this conviction to remain a mere catechumen the greater part of his life (*d*).

Interval
between con-
version and
baptism.

Catechumens were also designated "*auditores*" (*e*). In the 5th book of his Ecclesiastical Polity, Hooker says, "Ways of teaching there have been sundry always usual in God's church. For the first introduction of youth to the knowledge of God, the Jews even to this day have their Catechisms. With religion it fareth as with other sciences. The first delivery of the elements thereof must, for like consideration, be framed according to the weak and slender capacity of young beginners: unto which manner of teaching principles in Christianity, the apostle in the sixth to the Hebrews is himself understood to allude. For this cause therefore, as the Decalogue of Moses declareth summarily those things which we ought to do; the prayer of our Lord, whatsoever we should request or desire: so either by the Apostles, or at leastwise out of their writings, we have the substance of Christian belief compendiously drawn into few and short articles, to the end that the weakness of no man's wit might either hinder altogether the knowledge, or excuse the utter ignorance of needful things. Such as were trained up in their rudiments, and were so made fit to be afterward by Baptism received into the Church, the Fathers usually in their writings do term Hearers; as having no further communion or fellowship with the Church, than only this, that they were admitted to hear the principles of Christian faith made plain unto them" (*f*).

Hooker.

By the office for the ordination of deacons, catechising is made the especial duty of the deacon. In our colonies catechists constitute an intermediate class of teachers between missionaries and schoolmasters, not in holy orders, though very often candidates for admission to them.

Catechists in
our colonies.

(*d*) Bingham, Orig. Eccl. passim, Giannone, Istoria Civile di Napoli, lib. 2, c. 4, s. 1, vide supra, p. 493.

join in some prayers, and *compententes*, prepared for baptism.

(*e*) Also *genuflectentes*, allowed to

(*f*) Hooker, Eccles. Pol. Bk. V. c. 18.

Catechumens
in India.

In India catechumens, being previously instructed in the rudiments of Christianity, are admitted into the porch or the verandah of the church, and undergo a probation of two years before they receive the rite of baptism. A very long probation in the verandah is enjoined to all such as have relapsed before the period of their catechumenship has expired (*g*).

Blunt, Annotated Prayer Book.

Mr. Blunt observes, that when the offices of the Church of England were translated into English, a catechism was inserted in the office for confirmation. "This was of course to be learned during the period of preparation for confirmation; but the rubric directed that when the rite was to be administered, the bishop, or some one appointed by him, should 'appose' the persons to be confirmed by requiring them to answer such questions of this catechism as the former should see fit. The object of this was stated to be that those who were about to be confirmed might 'then themselves with their own mouth, and with their own consent, openly before the Church, ratify and confess' what their godfathers and godmothers had promised for them in their baptism. This custom was continued until the last revision of the Prayer Book in 1661; but in 1552 the word 'confess' in the rubric (used in the sense of confessing or professing our belief) was unfortunately altered to 'confirm,' and the rubric being then adopted as a preliminary address in the Confirmation Service (while that which had been referred to by the word was removed from it), a confusion of ideas was originated which connected the expression 'ratify and confirm' with the ordinance of laying on of hands instead of with the catechizing by which it is preceded. The catechism which thus stood in the Prayer Book from 1549 to 1661 (under both the general title of 'confirmation wherein is contained a catechism for children,' and the particular one by which it is now alone headed), was nearly identical with the present one, but only extended as far as the end of the explanation of the Lord's Prayer. It has often been said to have been made by Alexander Nowell, who was second master of Westminster School at the time when the Prayer Book was in preparation, but Dean of St. Paul's from 1560 to 1602" (*h*).

Canon 59.

By Can. 59, of 1603, "Every parson, vicar, or curate, upon every Sunday and holy-day, before evening prayer, shall for half an hour or more, examine and instruct the youth and ignorant persons of his parish, in the Ten Commandments, the Articles of the Belief, and in the Lord's Prayer; and shall diligently hear, instruct and teach them the Catechism set forth in the Book of Common Prayer. And all fathers, mothers, masters, and mistresses shall cause their children, servants and

(*g*) See in the Report of the Society for Propagation of the Gospel for 1838, p. 69, a very interesting letter from the Bishop of

Calcutta on this subject.

(*h*) Blunt, Annotated Book of Common Prayer, pp. 241, 242.

apprentices, which have not learned the Catechism, to come to the church at the time appointed, obediently to hear, and to be ordered by the minister until they have learned the same. And if any minister neglect his duty herein, let him be sharply reprov'd upon the first complaint, and true notice thereof given to the bishop or ordinary of the place. If, after submitting himself, he shall willingly offend therein again, let him be suspended; if so the third time, there being little hope that he will be therein reformed, then excommunicated, and so remain until he be reformed. And likewise if any of the said fathers, mothers, masters, or mistresses, children, servants, or apprentices, shall neglect their duties, as the one sort in not causing them to come, and the other, in refusing to learn; as aforesaid: let them be suspended by their ordinaries (if they be not children), and if they so persist, by the space of a month, then let them be excommunicated."

And by the rubric at the end of the catechism, superseding, to a certain extent, this canon, it is enacted, that "The curate of every parish shall diligently upon Sundays and holy-days, after the second lesson at evening prayer, openly in the church instruct and examine so many children of his parish sent unto him, as he shall think convenient, in some part of the catechism. And all fathers, mothers, masters and dames, shall cause their children, servants and apprentices (which have not learned their catechism), to come to the church at the time appointed, and obediently to hear, and be ordered by the curate, until such time as they have learned all that therein is appointed for them to learn."

Rubric en-
joining cate-
chising.

That part of the church catechism which treats of the sacraments is not in the Prayer Book of the 2nd or 6th of Edw. 6, but was added in the beginning of the reign of King James the First, upon the conference at Hampton Court (*i*). The Puritans complained that it was too short in its existing form. "The addition," says Cosin (*k*), "was first penned by Bishop Overall" (then Dean of St. Paul's) "and allowed by the bishops."

Origin of
later part of
catechism.

In the office of public baptism, the minister directs the god-fathers and godmothers to take care that the child be brought to the bishop to be confirmed by him, so soon as he or she can say the Creed, the Lord's Prayer, and the Ten Commandments in the vulgar tongue, and be further instructed in the church catechism set forth for that purpose.

Rubric as to
duty of
sponsors.

"It is obvious," Mr. Blunt observes, "from the history of the Catechism, that it was formed upon the basis of the Creed, the Lord's Prayer and the Ten Commandments. To these and to the catechetical exposition connected with them, was prefixed a fourth division on the Christian nature and covenant; and at

From what
Catechism
formed.

(*i*) Gibs. p. 375.

(*k*) Cosin, Works, Vol. V., Notes

and Collections on the Book of
Common Prayer, p. 491.

the end was afterwards added a fifth division on the Sacraments. It has thus become a comprehensive summary respecting, (1) The relation between God and Christians, (2) Faith, (3) Duty, (4) Prayer, (5) Grace. But although thus happily comprehensive, it must be remembered that it does not profess to be exhaustive; and that when the Puritans at the Savoy Conference wished it to be made longer by adding questions on justification, sanctification, &c., the Bishops replied, 'The Catechism is not intended as a whole body of divinity, but as a comprehension of the Articles of Faith, and other doctrines most necessary to salvation' (1).

(1) Blunt, Annotated Book of Common Prayer, p. 243.

CHAPTER IV.

CONFIRMATION.

CONFIRMATION is the rite of the Church whereby the faith of the baptized person is confirmed and grace given to him to remain steadfast in that faith. What the rite is.

The rite is founded on the apostolical practice and precedent recorded in the Acts of the Apostles (c. viii. 14—17) (*a*), "Now when the apostles which were at Jerusalem heard that Samaria had received the word of God, they sent unto them Peter and John: Who, when they were come down, prayed for them, that they might receive the Holy Ghost; For as yet he was fallen upon none of them; only they were baptized in the name of the Lord Jesus. Then laid they their hands on them, and they received the Holy Ghost." Founded on apostolical practice.

The Roman and Greek Churches use oil in the administration of this rite. Use of Roman and Greek churches.

According to the present rule of the former church the rite can only be administered by a bishop, though the pope may delegate a priest to perform this office. The Greek Church commits the administration of it to a priest; but the chrism used on the occasion receives the previous benediction of the bishop.

The English Church holds that it is competent to the bishop only to administer this rite.

With respect to the proper age of the baptised person to be the recipient of this rite, the Roman Church (*b*) requires him to Age of persons to be confirmed.

(*a*) The following valuable and remarkable passage is from St. Cyprian, Epist. 73, (8): "Illi enim qui in Samaria crediderant, fide verà crediderant et intus in ecclesià, quæ una est, et cui soli gratiam baptismi dare et peccata solvere permissum est, a Philippo diacono, quem iidem apostoli miserant, baptizati erant. Et ideo quia legitimum baptismum consecuti fuerint, baptisari eos ultra non oportebat, sed tantummodo quod deerat, id a Petro et Joanne factum est, ut oratione pro eis habità, et manu imposità invocaretur et infunderetur super eos Spiritus sanctus. Quod nunc quoque apud nos geritur,

ut qui in ecclesià baptisantur, præpositis ecclesiæ offerantur, et per nostram orationem ac manus impositionem Spiritum sanctum consequantur et *signaculo dominico* consummentur." In the first Prayer Book of Edward VI. it was thus ordered: "Then the bishop shall cross them in the forehead and lay his hand upon their head, saying, 'N., I sign thee with the sign of the cross,' and, &c." The sign of the cross and this direction is omitted in the later Prayer Books.

(*b*) Devoti, Inst. Can. t. 1, sect. 11, p. 421, De Confirmatione; Müller, Lexicon des Kirchenrechts, "Firmung," ii. 883.

be seven years of age at the least. The Greek Church allows confirmation very soon after baptism, and this appears to have been the primitive usage.

The English Church has fixed no particular age, but requires the candidate to be of "competent age," meaning, as appears from the service and the orders relating to it, that he should be confirmed as soon as he has a knowledge of and is able to repeat in English the Creed, the Lord's Prayer and the Ten Commandments, and be able to answer questions from the catechism.

Rite cannot
be repeated.

The churches agree that confirmation, like baptism, cannot be repeated.

Law of the
Church of
England.

The present law of the Church of England is contained in the following canons and rubrics.

Time of con-
firmation.

In the office of public baptism, the minister directs the god-fathers and godmothers to take care "that this child be brought to the bishop to be confirmed by him, so soon as he can say the Creed, the Lord's Prayer and the Ten Commandments in the vulgar tongue, and be further instructed in the Church Catechism, set forth for that purpose."

Rubrics.

And by the rubric at the end of the office of baptism of those that are of riper years:—"It is expedient that every person thus baptized, should be confirmed by the bishop, so soon after his baptism as conveniently may be, that so he may be admitted to the holy communion."

And by the rubric at the end of the catechism:—"So soon as children are come to a competent age, and can say in their mother tongue the Creed, the Lord's Prayer, and the Ten Commandments, and also can answer to the other questions of the catechism, they shall be brought to the bishop."

Canon 60.

By Can. 60 of 1603, "Forasmuch as it hath been a solemn, ancient, and laudable custom in the church of God, continued from the apostles' times, that all bishops should lay their hands upon children baptized and instructed in the catechism of Christian religion, praying over them, and blessing them, which we commonly call confirmation; and that this holy action hath been accustomed in the church in former ages, to be performed in the bishop's visitation every third year; we will and appoint, That every bishop or his suffragan, in his accustomed visitation, do in his own person carefully observe the said custom. And if in that year, by reason of some infirmity, he be not able personally to visit, then he shall not omit the execution of that duty of confirmation the next year after, as he may conveniently."

Canon 61.

By Can. 61, "Every minister, that hath cure and charge of souls, for the better accomplishing of the orders prescribed in the Book of Common Prayer concerning confirmation, shall take especial care, that none may be presented to the bishop for him to lay his hands upon, but such as can render an account of their faith according to the Catechism in the said book contained. And when the bishop shall assign any time for the

performance of that part of his duty, every such minister shall use his best endeavour to prepare and make able, and likewise to procure as many as he can to be then brought, and by the bishop to be confirmed."

And by the rubric at the end of the Catechism:—"And Rubrics.
whenever the bishop shall give knowledge for children to be brought unto him for their Confirmation, the curate of every parish shall either bring or send in writing, with his hand subscribed thereunto, the names of all such persons within his parish as he shall think fit to be presented to the bishop to be confirmed. And if the bishop approve of them, he shall confirm them in manner following."

And by the previous rubric:—"And every one shall have a godfather or a godmother as a witness of their confirmation."

And by Can. 29:—" . . . neither shall any person be Canon 29.
admitted godfather or godmother to any child at confirmation before the said person so undertaking hath received the holy communion" (c).

Lord Coke says, "If a man be baptized by the name of Thomas, and after, at his confirmation by the bishop, he is named John, he may purchase by the name of his confirmation. And this was the case of Sir Francis Gawdie, chief justice of the Court of Common Pleas, whose name by baptism was Thomas, and his name of confirmation Francis; and that name of Francis, by the advice of all the judges, *in anno* 36 Hen. VIII., he did bear, and after used in all his purchases and grants" (d). Change of name.

Dr. Burn, however, observes, "But this seemeth to be altered by the form of the present liturgy. In the offices of old, the bishop pronounced the name of the child or person confirmed by him, and if he did not approve of the name, or the person himself or his friends desired it to be altered, it might be done by the bishop's pronouncing a new name upon his ministering this rite, and the common law allowed the alteration; but upon review of the liturgy at King Charles the Second's restoration, the office of confirmation is altered as to this point, for now the bishop doth not pronounce the name of the person confirmed, and therefore cannot alter it" (e).

Under the title Baptism, Dr. Burn had made the same observation, adding, "this might be so in the time of Lord Coke, but now the case seemeth to be altered." But Lord Coke's authority cannot be set aside in this way. He had before him at the time when he thus laid down the law the confirmation services of Edward and Elizabeth, which are not, as might be inferred from the remark of Dr. Burn, different in this respect from that of Charles the Second. There seems to be no reason to impugn the authority of the precedent cited by

(c) Quoted in full at p. 487.

(e) Vol. I. p. 80.

(d) 1 Inst. p. 3.

Lord Coke. Bishop Kennett has left on record in some MS. notes to the Prayer Book, which are now in the British Museum, an account of a case in which a bishop changed the name of a child so lately as 1707. He states the fact as follows:—"On Sunday, December 21st, 1707, the Lord Bishop of Lincoln confirmed a young lad in Henry VII.'s chapel: who upon that ceremony was to change his christian name, and, accordingly, the sponsor who presented him delivered to the Bishop a certificate, which his lordship signed, to notify that he had confirmed such a person by such a name, and did order the parish minister then present to register the person in the parish book under that name. This was done by the opinion under hand of Sir Edward Northey, and the like opinion of Lord Chief Justice Holt, founded on the authority of Sir Edward Coke, who says it was the common law of England" (*f*). There is also an instance of such change of name on record as having occurred in the diocese of Cork, in Ireland, as late as A.D. 1761 (*g*); and the practice is occasionally continued to the present day (*h*).

Admission to
the holy
communion.

By the rubric at the end of the Office of Confirmation, "There shall none be admitted to the holy Communion, until such time as he be confirmed, or be ready and desirous to be confirmed" (*i*).

(*f*) Blunt, Annotated Book of Common Prayer, note to "Order of Confirmation."

(*g*) Notes and Queries, 4th Series, VI. p. 17.

(*h*) For a later case in the diocese

of Liverpool, on June 11, 1886, see Notes and Queries, 7th Series, II. p. 77.

(*i*) For the antiquity of confirmation, see De Cons. v. (or Con. v.) and Inst. Juris. Can. ii. p. 4.

CHAPTER V.

THE SACRAMENT OF THE LORD'S SUPPER.

THE sacrament of the Lord's Supper, intituled by our Lord himself (*a*), constitutes the principal part, the great central act of Christian worship. From the very early history of Christianity it appears, that on the Sunday the faithful met together, and, after hearing portions of the Holy Scriptures read, and a sermon by the bishop, produced offerings of bread, wine and water, which being consecrated by the prayer and blessing of the bishop or priest, were distributed among those present, and portions were sent through the deacons to the absent members of the congregation. At a later period a small portion of these elements was consecrated.

The principal act of worship.

The names by which this sacrament is designated in the Holy Scriptures are these:—

Names of this sacrament.

The supper of the Lord (*b*).

The table of the Lord (*c*).

The communion of the blood and body of Christ (*d*).

The cup of blessing: the bread which is broken (*e*).

The breaking of bread (*f*).

In the writings of the Fathers we find the following designations: *eucharistia*, *mysterium*, *oblatio*, *collecta*, *sacra mensa*, *sacramentum pacis et charitatis*, *alimentum et poculum immortalitatis*, ἡ ἀγία συνάξις, ἡ θυσία, *sacrificium altaris*, *sacramentum* (*g*).

The English divines speak of the sacrament of the altar (*h*),

(*a*) Matt. xxvi. 26—28; Mark, xiv. 22—24; Luke, xxii. 19—20; Acts, ii. 42; John, vi. 47—58; *Sheppard v. Bennett*, judgment in Court of Arches, L. R. 3 Adm. & Eccl. p. 167, and Special Report.

(*b*) 1 Cor. xi. 20.

(*c*) 1 Cor. x. 21.

(*d*) 1 Cor. x. 16.

(*e*) Ibid.

(*f*) Acts of the Apostles, ii. 42. "Distinguendum est tamen subtiliter intra tria quæ sunt in hoc sacramento discreta, videlicet formam visibilem, veritatem corporis,

et virtutem specialem: forma est panis et vini, veritas carnis et sanguinis, virtus unitatis et charitatis. Primum est sacramentum et non res. Secundum est sacramentum et res. Tertium est res et non sacramentum." X. iii. 41, 6.

(*g*) As to the canon law, cf. X. iii. 41, De celebratione missarum et sacramento eucharistiæ et divinis officiis. Clem. iii. 14. De celebratione missarum et aliis divinis officiis.

(*h*) Cosin, Works, Vol. V., Notes and Collections on the Book of

the eucharist, and the holy communion, the feast on a sacrifice (*i*).

The Roman branch of the Catholic Church uses the term "mass," the origin of which is doubtful. Some writers have deduced it from a Hebrew word meaning sacrifice; some from the Greek *μυστήριον*, mystery; others from the Latin word "mittere," because through the hands of the priest the unbloody sacrifice was offered to God; but the more probable derivation is from the Latin word "missa," used instead of *missio*, to signify the *dimissio* of the initiated or faithful—*missa fidelium*—at the close of the service, *ite missa est*, i.e., *est missio vobis*; the catechumens or uninitiated having been dismissed after the reading of the gospel and the sermon (*k*)—*missa catechumenorum* (*l*).

The name was first discontinued by the English Church in Edward the Sixth's reign, though in the first Prayer Book (A.D. 1549), put forth in the second year of his reign, the title was "The Supper of the Lord and the Holy Communion, commonly called the Mass;" and in "The Order of the Communion" (A.D. 1548), which preceded this book, the second rubric says, "The time of the communion shall be immediately after that the priest himself hath received the sacrament, without the varying of any other rite or ceremony in the mass (until other order shall be provided)" In this "order" the communion was administered as now in both kinds, and with a portion of the language now used in our Prayer Book.

The body and blood verily received.

But under every appellation the Church has always holden, according to the language of our catechism, that "the body and blood of Christ are verily and indeed taken and received by the faithful in the Lord's Supper."

Transubstantiation.

The doctrine of Transubstantiation is one of the novelties which the Church of Rome engrafted upon the doctrine of the primitive church.

In A.D. 1215, Pope Innocent the Third induced a council of the Western Church, which is untruly styled the twelfth general or œcumenical council, to declare that in the sacrament of the altar "the bread was by divine omnipotence transubstantiated into His Body and the wine into His Blood (*m*). According to the 28th Article of our Church, "Transubstantiation

Common Prayer, p. 102. "A necessary Doctrine and Erudition for any Christian Man," written by Cranmer (Formularies of Faith, Hen. VIII., Oxford, 1856, p. 262).

(*i*) Bishop Cleaver. The Act 1 Edw. 6, c. 1, passed in 1547, is entitled "An Act against such as shall unreverently speak against the Sacrament of the Body and Blood of Christ, commonly called the Sacrament of the Altar, and

the receiving thereof in both kinds."

(*k*) Du Cange, Gloss. voce *Missæ*.

(*l*) Müller, Lexicon des Kirchenrechts, IV. p. 80.

(*m*) The expression appears for the first time in the canon law in X. iii. 41. 6. "Quæсивisti si quidem quis formæ verborum, quam ipse Christus expressit quum in corpus et sanguinem suum panem transubstantiavit et vinum," &c.

(or the change of the substance in bread and wine) in the supper of the Lord cannot be proved by Holy Writ; but is repugnant to the plain words of Scripture, overthroweth the nature of a sacrament, and hath given occasion to many superstitions."

According to the rubric at the end of the Office of Confirmation, "There shall none be admitted to the holy Communion until such time as he be confirmed, or be ready and desirous to be confirmed."

Who shall or shall not be admitted to the holy communion.

According to the constitution of Archbishop Peccham, "None shall give the communion to the parishioner of another priest without his manifest licence; which ordinance nevertheless shall not extend to travellers, nor to persons in danger, nor to cases of necessity" (n).

Travellers are parishioners of every parish (o).

Persons in danger; that is, in danger of death (p).

And by Can. 28 of 1603, "The church-wardens or questmen and their assistants, shall mark, as well as the minister, whether all and every of the parishioners come so often every year to the holy communion as the laws and our constitutions do require: and whether any strangers come often and commonly from other parishes to their church, and shall show their minister of them; lest perhaps they be admitted to the Lord's table amongst others, which they shall forbid, and remit such home to their own parish churches and ministers, there to receive the communion with the rest of their own neighbours." Canon 28.

The second paragraph of the rubric at the beginning of the order of the administration of the Lord's supper enacts, "And if any of those be an open and notorious evil liver, or have done any wrong to his neighbours by word or deed, so that the congregation be thereby offended; the curate, having knowledge thereof, shall call him and advertise him, that in any wise he presume not to come to the Lord's table, until he hath openly declared himself to have truly repented, and amended his former naughty life, that the congregation may thereby be satisfied, which before were offended; and that he hath recompensed the parties to whom he hath done wrong, or at least declare himself to be in full purpose so to do, as soon as he conveniently may." Rubric at beginning of Office.

And "The same order shall the curate use with those betwixt whom he perceiveth malice and hatred to reign; not suffering them to be partakers of the Lord's table until he know them to be reconciled. And if one of the parties so at variance be content to forgive, from the bottom of his heart, all that the other hath trespassed against him, and to make amends for that he himself hath offended, and the other party will not be persuaded to a godly unity, but remain still in his frowardness and malice, the minister in that case ought to admit the penitent person to the holy communion, and not him that is obstinate. Provided,

(n) Lind. p. 233.

(o) Ibid.

(p) Ibid.

that every minister so repelling any, as is specified in this or the next preceding paragraph of this rubric, shall be obliged to give an account of the same to the ordinary within fourteen days after at the farthest. And the ordinary shall proceed against the offending person according to the canon."

Canon 26.

By Can. 26 of 1603, "No minister shall in any wise admit to the receiving of the holy communion, any of his cure or flock, which be openly known to live in sin notorious, without repentance, nor any who have maliciously and openly contended with their neighbours, until they shall be reconciled, nor any churchwardens or sidemen who having taken their oaths to present to their ordinaries all such public offences as they are particularly charged to inquire of in their several parishes shall (notwithstanding their said oaths, and that their faithful discharging of them is the chief means whereby public sins and offences may be reformed and punished) wittingly and willingly, desperately and irreligiously incur the horrible crime of perjury, either in neglecting or in refusing to present such of the said enormities and public offences as they know themselves to be committed in their said parishes or are notoriously offensive to the congregation there; although they be urged by some of their neighbours, or by their minister or by their ordinary himself, to discharge their consciences by presenting them, and not to incur so desperately the said horrible sin of perjury."

Canon 27.

By Can. 27, "No minister, when he celebrateth the communion, shall wittingly administer the same to any but to such as kneel, under pain of suspension, nor, under the like pain, to any that refuse to be present at public prayers, according to the orders of the Church of England; nor to any that are common and notorious depravers of the Book of Common Prayer, and Administration of the sacraments, and of the orders, rites and ceremonies therein prescribed; or of any thing that is contained in any of the Articles agreed upon in the Convocation, 1562; or of any thing contained in the book of ordering priests and bishops, or to any that have spoken against and depraved his majesty's sovereign authority in causes ecclesiastical, except every such person shall first acknowledge to the minister, before the churchwardens his repentance for the same, and promise by word (if he cannot write) that he will do so no more; and except (if he can write) he shall first do the same under his handwriting, to be delivered to the minister, and by him sent to the bishop of the diocese, or ordinary of the place. Provided, that every minister so repelling any (as is specified either in this or in the next preceding Constitution) shall upon complaint, or being required by the ordinary, signify the cause thereof unto him, and therein obey his order and direction."

Canon 109.

By Can. 109, "If any offend their brethren, either by adultery, whoredom, incest, or drunkenness, or by swearing, ribaldry, usury, any other uncleanness and wickedness of life, the churchwardens or quest-men and side-men in their next presentments to

their ordinaries shall faithfully present all and every of the said offenders, to the intent that they and every of them, may be punished by the severity of the laws, according to their deserts; and such notorious offenders shall not be admitted to the holy communion, till they be reformed."

In the case of *Jenkins v. Cook*, it was holden, in the Archies *Jenkins v. Cook.* Court, in 1875, that a layman who had published a book of "Selections from the Old and New Testament," from which large portions of the Bible were omitted, on the ground, as he stated, that the parts omitted were in their present generally received sense quite incompatible with religion or decency, and who expressed his disbelief in the doctrines of eternal punishment, and, it appeared, punishment for sin at all, and the existence of the devil, was rightly repelled from the holy communion by the incumbent of his parish, under the provisions of the second rubric in the Order of the Administration of the Lord's Supper and the 27th Canon (*q*).

It was further holden that the incumbent, having notified to the bishop the facts of the case and sought his advice thereon, and having then received from him either no "order and direction" at all or an "order and direction" which he obeyed in repelling the layman, had discharged the duty imposed upon him by the rubric, and was therefore not liable to criminal proceedings in the Ecclesiastical Court at the suit of the layman (*q*).

This decision was, however, reversed on appeal, and it was held by the Judicial Committee of the Privy Council (who came to the conclusion that the court below had erroneously attributed to the layman doctrines in denial of the existence and personality of the devil, and of eternal or other punishment for sin in a future state,) that the layman was neither "an open and notorious evil liver" within the meaning of the rubric, nor "a common and notorious depraver of the Book of Common Prayer" within the meaning of the 27th Canon; that no legal cause of repulsion had been shown, and that the incumbent was liable to criminal proceedings at the suit of the layman (*r*).

By Can. 71 of 1603, "No minister shall administer the holy *Canon 71.* communion in any private house, except it be in times of necessity, when any being either so impotent as he cannot go to the church, or very dangerously sick, are desirous to be partakers of the holy sacrament, upon pain of suspension for the first offence and excommunication for the second. Provided, that houses are here reputed for private houses, wherein are no chapels dedicated and allowed by the ecclesiastical laws of this realm. *Not to be administered in private house.*

(*q*) L. R. 4 Adm. & Eccl. p. 463. Communion in "Office of a Justice of the Peace" (published by Lee, Pateman and Bedell, London, 1662),

(*r*) S. C., on appeal, 1 P. D. p. 80. See a precedent of an indictment for refusing the Holy p. 378. *Sed quære.*

And provided also, under the pains before expressed, that no chaplains do preach or administer the communion in any other places, but in the chapels of the said houses; and that also they do the same very seldom upon Sundays and holidays: so that both the lords and masters of the said houses and their families, shall at other times resort to their own parish churches, and there receive the holy communion at the least once every year."

Canon 22.
Notice to be
given of the
holy com-
munion.

By Can. 22, "Whereas every lay person is bound to receive the holy communion thrice every year, and many notwithstanding do not receive that sacrament once in a year, we do require every minister to give warning to his parishioners publicly in the church at morning prayer, the Sunday before every time of his administering that holy sacrament, for their better preparation of themselves; which said warning we enjoin the said parishioners to accept and obey, under the penalty and danger of the law."

Rubric.

And by the rubric: The minister "shall always give warning for the celebration of the holy communion . . . upon the Sunday or some holiday immediately preceeding."

And "So many as intend to be partakers of the holy communion shall signify their names to the curate at least some time the day before."

Notice of
intention to
communicate,
whether
necessary.

In the thirteenth year of Charles the Second's reign, an action upon the case was brought against a minister for refusing the sacrament to another, and the jury found for the plaintiff, and gave damages. And it was moved in arrest of judgment, among other things, that the party had not set forth in his declaration, that he gave notice according to the statute, nor that he was a parishioner of that parish, without which the minister might not admit him by the laws of the church. But these points appear not to have come under consideration, because another exception was of itself adjudged to be fatal, viz., that the plaintiff declared for not administering two Sundays, and had not set forth that in the second instance he desired the minister to do it, and yet entire damages had been given for both (s).

In a case decided in the Provincial Court of Armagh, in 1852, it was holden that it was not incumbent upon an intending communicant to give the notice (t).

What number
is requisite
for com-
municating.

Another rubric enacts that "There shall be no celebration of the Lord's Supper, except there be a convenient number to communicate with the priest, according to his discretion."

"And if there be not above twenty persons in the parish of discretion to receive the communion, yet there shall be no communion except four (or three at the least) communicate with the priest."

"And in cathedral and collegiate churches and colleges,

(s) *Clorell v. Cardinall*, 1 Sid. p. 34.

(t) Cited in *Clifton v. Ridsdale*, 1 P. D. at pp. 331, 347.

where there are many priests and deacons, they shall all receive the communion with the priest every Sunday at the least, except they have a reasonable cause to the contrary."

In *Parnell v. Roughton* (*u*), the privy council held that it is sufficient in charging a clergyman with an ecclesiastical offence in celebrating the holy communion when less than three persons communicated, to charge the fact *simpliciter* in the words of the rubric. If the clerk wishes to contend that there were other persons in the church whom he expected to communicate, he must plead this by way of defence.

In *Clifton v. Ridsdale* (*x*), on a charge that the defendant had celebrated the holy communion when only one person communicated with him, Lord Penzance held that the fact that a large number of persons were present at the celebration who were possible communicants is not a sufficient defence, if the minister before he began the celebration has not reasonable cause to believe and does not believe that three persons at least would communicate with him.

By Can. 20 of 1602, "The church-wardens of every parish, against the time of every communion, shall at the charge of the parish, with the advice and direction of the minister, provide a sufficient quantity of fine white bread, and of good and wholesome wine, for the number of communicants that shall from time to time receive there; which wine we require to be brought to the communion table in a clean and sweet standing pot or stoop of pewter, if not of purer metal."

Canon 20.
Elements to
be provided.

And by the rubric, "The bread and wine for the communion shall be provided by the curate and churchwardens at the charges of the parish."

Rubric.

In the case of *Franklyn* and *The Master and Brethren of St. Cross* in 1721 (*y*), although by the endowment the vicar was to find the sacrament wine, yet the court were of opinion it should be found by the parishioners, according to the canon. It might have been also said, according to the rubric.

The rubric also enacts, "And to take away all occasion of dissension and superstition which any person hath or might have concerning the bread and wine, it shall suffice that the bread be such as is usual to be eaten, but the best and purest wheat bread that conveniently may be gotten."

Quality of
sacramental
bread and
wine.

The decisions on this rubric as to the element of bread in the cases of *Mr. Purchas* and of *Mr. Ridsdale*, and as to the element of wine in the cases of *Mr. Mackonochie*, *Mr. Ridsdale*, and of the Bishop of Lincoln will be noticed hereafter (*z*).

(*u*) L. R. 6 P. C. p. 46.

(*x*) 1 P. D. p. 316.

(*y*) Bunb. p. 79.

(*z*) *Elphinstone v. Purchas*, L. R. 3 Adm. & Eccl. p. 66; *S. C.*, on appeal *nomine Hebbert v. Purchas*, L. R. 4 P. C. p. 301; *Ridsdale v.*

Clifton, 2 P. D. p. 276; *Martin v. Mackonochie*, L. R. 2 Adm. & Eccl. p. 116; on appeal L. R. 3 P. C. p. 52; *Read v. Bp. of Lincoln*, P. 1891, p. 9, vide infra, Part III., Chap. XI., Sect. 7.

Offertory.

In the rubric in the communion service of the 2 Edw. 6, it was ordained that "whyles the clearkes do syng the offertory, so many as are disposed, shall offer unto the poore mennes boxe, every one according to his habilitie and charitable mynde."

And by the present rubric, whilst the sentences of the offertory "are in reading, the deacons, churchwardens, or other fit person appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent bason, to be provided by the parish for that purpose, and reverently bring it to the priest, who shall humbly present and place it upon the holy table."

A later rubric enacts that after divine service is ended, "The money given at the offertory shall be disposed of to such pious and charitable uses as the minister and churchwardens shall think fit. Wherein if they disagree, it shall be disposed of as the ordinary shall appoint."

Vestments :
ceremonies.

The vestments of the celebrant minister and his assistants are the subject of rubrical provisions which have undergone much judicial interpretation. They will be treated of hereafter (*a*). There have been also a number of decisions upon the ceremonies prescribed or forbidden during the celebration of this service. These also will be found in a later place (*b*).

Holy table.

The Canon (82 of 1603), and the modern decisions, as to the structure and material of the holy table will be found in the same chapter (*c*).

Posture of the
communi-
cants.

By Can. 27, of 1603, "No minister, when he celebrateth the communion, shall wittingly administer the same to any but to such as kneel, under pain of suspension" (*d*).

And by the rubric at the end of the communion office: "Whereas it is ordained in this office for the administration of the Lord's Supper, that the communicants should receive the same kneeling (which order is well meant for a signification of our humble and grateful acknowledgment of the benefits of Christ therein given to all worthy receivers, and for the avoiding of such profanation and disorder in the holy communion as might otherwise ensue). Yet lest the same kneeling should, by any persons, either out of ignorance or infirmity, or out of malice and obstinacy, be misconstrued or depraved; It is here declared, that thereby no adoration is intended or ought to be done either unto the sacramental bread and wine, there bodily received, or unto any corporal presence of Christ's natural flesh and blood. For the sacramental bread and wine remain still in their very natural substances, and therefore may not be adored, (for that were idolatry, to be abhorred of all faithful Christians) And the natural body and blood of our Saviour Christ are in heaven, and not here, it being against the

(*a*) Part III., Chap. XI., Sect. 3.

(*b*) Ibid. Sect. 7.

(*c*) Ibid. Sect. 4.

(*d*) Cited in full, *supra*, p. 522.

truth of Christ's natural body to be at one time in more places than one."

By Article 30 of the Thirty-nine Articles, "The cup of the Lord is not to be denied to the lay people, for both the parts of the Lord's Sacrament, by Christ's ordinance and commandment, ought to be ministered to all Christian men alike." Communion in both kinds.

And by 1 Edw. 6, c. 1, s. 8, "Forasmuch as it is more agreeable to the first institution of the said sacrament of the most precious body and blood of our Saviour Jesus Christ, and also more conformable to the common use and practice of the apostles and of the primitive church for the space of 500 years and more after Christ's ascension, that the said blessed sacrament should be administered to all Christian people under both the kinds of bread and wine, than under the form of bread only; and also it is more agreeable to the first institution of Christ, and to the usage of the apostles and the primitive church, that the people being present should receive the same with the priest than that the priest should receive it alone;" it is therefore enacted, "that the said most blessed sacrament be hereafter commonly delivered and ministered unto the people. . . . under the both kinds, that is to say, of bread and wine, except necessity otherwise require: And also that the priest, which shall minister the same, shall at the least one day before exhort all persons which shall be present likewise to resort and prepare themselves to receive the same, and when the day prefixed cometh, after a godly exhortation by the minister made (wherein shall be further expressed the benefit and comfort promised to them which worthily receive the said holy sacrament, and danger and indignation of God threatened to them which shall presume to receive the same unworthily, to the end that every man may try and examine his own conscience before he shall receive the same), the said minister shall not without lawful cause deny the same to any person that will devoutly and humbly desire it. . . . not condemning hereby the usage of any church out of the king's majesty's dominions." 1 Edw. 6, c. 1.

By the rubric, "And if any of the bread and wine remain unconsecrated, the curate shall have it to his own use, but if any remain of that which was consecrated, it shall not be carried out of the church, but the priest, and such other of the communicants as he shall then call unto him, shall immediately after the blessing reverently eat and drink the same." Bread and wine remaining.

By a constitution of Archbishop Langton, it is enjoined that, "No sacrament of the church shall be denied to any one upon the account of any sum of money, but if any thing hath been accustomed to be given by the pious devotion of the faithful, justice shall be done thereupon to the churches by the ordinary of the place afterwards" (e). Oblations due to the minister.

And by the rubric, "And yearly at Easter, every parishioner

shall reckon with the parson, vicar or curate, or his or their deputy or deputies, and pay to them or him all ecclesiastical duties, accustomedly due, then and at that time to be paid."

How often
in the year to
be adminis-
tered.

By the ancient canon law, every layman (not prohibited by crimes of a heinous nature) was required to communicate at least thrice in the year, namely, at Easter, Whitsuntide, and Christmas; and the secular clergy not communicating at those times were not to be reckoned amongst catholics (*f*).

And by the rubric, "And note that every parishioner shall communicate at the least three times in the year, of which Easter to be one."

Canon 21.

And by Can. 21 of 1603, "In every parish church and chapel, where sacraments are to be administered within this realm, the holy communion shall be administered by the parson, vicar, or minister, so often, and at such times, as every parishioner may communicate at the least thrice in the year, (whereof the feast of Easter to be one, according as they are appointed by the Book of Common Prayer). Provided that every minister, as oft as he administereth the communion, shall first receive that sacrament himself. Furthermore no bread or wine newly brought shall be used; but first the words of institution shall be rehearsed, when the said bread and wine be present upon the communion table. Likewise the minister shall deliver both bread and the wine to every communicant severally."

Canon 28.

Can. 28. "The church-wardens or questmen, and their assistants, shall mark as well as the minister whether all and every of the parishioners come so often every year to the holy communion as the laws and constitutions do require" (*g*).

Canon 112.

Can. 112. "The minister, church-wardens, questmen and assistants of every parish church and chapel, shall yearly, within forty days after Easter exhibit to the bishop or his chancellor the names and surnames of all the parishioners, as well men as women, which being of the age of sixteen years received not the communion at Easter before."

Canon 24.

By Can. 24, "All deans, wardens, masters, or heads of cathedral and collegiate churches, prebendaries, canons, vicars, petty canons, singing men, and all others of the foundation, shall receive the communion four times yearly at the least" (*h*).

Canon 23.

And by Can. 23, "In all colleges and halls within both the universities, the masters and fellows, such especially as have any pupils, shall be careful that all their said pupils, and the rest that remain among them, be well brought up, and thoroughly instructed in points of religion, and that they do diligently frequent public service and sermons, and receive the holy communion; which we ordain to be administered in all such colleges and halls the first or second Sunday of every

(*f*) *Gibs.* p. 387.

(*g*) This Canon is set out in full at p. 521.

(*h*) This Canon is set out in full at p. 135.

month, requiring all the said masters, fellows, and scholars, and all the rest of the students, officers, and all other the servants there, so to be ordered, that every one of them shall communicate four times in the year at the least, kneeling reverently and decently upon their knees, according to the order of the Communion book prescribed in that behalf."

By 1 Edw. 6, c. 1, s. 1, whosoever shall deprave, despise or contemn the most blessed sacrament of the body and blood of our Saviour Jesus Christ, commonly called the sacrament of the altar, and in scripture the supper and table of the Lord, the communion and partaking of the body and blood of Christ, in contempt thereof, by any contemptuous words, or by any words of depraving, despising or reviling, or whosoever shall advisedly in any otherwise contemn, despise or revile the said most blessed sacrament, contrary to the effects and declaration abovesaid, shall suffer imprisonment of his body, and make fine and ransom at the king's will.

1 Edw. 6, c. 1.
Secular
penalty for
depraving the
holy com-
munion.

Sects. 2, 3, and 4 provide for the trial of offences against this statute at quarter sessions.

By sect. 5, "Provided that the said justices at their quarter sessions, where any offender shall be or stand indicted of any of the . . . offences aforesaid shall direct and award one writ in the king's name to the bishop of the diocese wherein the offence or offences be supposed to be committed, willing and requiring the said bishop to be in his own person, or by his chancellor, or other his sufficient deputy learned at the quarter sessions in the said county to be holden, when and where the said offender shall be arraigned and tried, appointing to them in the said writ the day and place of the said arraignment, which writ" shall be of the form given in the act.

This statute has not yet been repealed, but is practically inoperative.

By the rubric, "Upon the Sundays and other holy-days (if there be no communion) shall be said all that is appointed at the communion, until the end of the general prayer For the whole state of Christ's church militant here on earth, together with one or more of these collects last before rehearsed: concluding with the blessing."

Service when
there is no
communion.

In the last rubric to the communion service of the second Prayer Book of Edward the Sixth these words occur . . . "lest yet the same kneeling might be thought or taken otherwise, we do declare that it is not meant thereby, that any adoration is done, or ought to be done, either unto the sacramental bread and wine there bodily received, or to any real or essential presence there being of Christ's natural flesh and blood."

Real
Presence.
Alteration of
rubric.

But in the present rubric these words have undergone a remarkable change, as follows: "Or unto any corporal presence of Christ's natural flesh and blood."

"It was happy with Christendom," says Bishop Taylor, "when she, in this article, retained the same simplicity, which

Bishop
Jeremy
Taylor.

she was always bound to do in her manners and intercourse; that is, to believe the thing heartily, and not to enquire curiously; and there was peace in this article for almost a thousand years together; and yet that Transubstantiation was not determined, I hope to make very evident: '*In synaxi transubstantiationem serò definivit ecclesia; diù satis erat credere, sive sub pane consecrato, sive quocunque modo adesse verum corpus Christi;*' so said the great Erasmus (i). 'It was late before the church defined transubstantiation; for a long time together it did suffice to believe that the true body of Christ was present, whether under the consecrated bread or any other way:' so the thing was believed, the manner was not stood upon. And it is a famous saying of Durandus (k), '*Verbum audimus, motum sentimus, modum nescimus, præsentiam credimus*—We hear the word, we perceive the motion, we know not the manner, but we believe the presence.' And Ferus (l), of whom Sixtus Senensis (m) affirms that he was '*vir nobiliter doctus, pius et eruditus,*' hath these words: '*Cum certum sit ibi esse corpus Christi, quid opus est disputare num panis substantia maneat, vel non?*'—When it is certain that Christ's body is there, what need we dispute whether the substance of bread remain or no?' And therefore Cuthbert Tonsal (n), Bishop of Duresme, would have every one left to his conjecture concerning the manner; '*De modo quo id fieret, satius erat curiosum quemque relinquere suæ conjecturæ, sicut liberum fuit ante concilium Lateranum*—Before the Lateran Council it was free for every one to opine as they please, and it were better it were so now.' But St. Cyril (o) would not allow so much liberty; not that he would have the manner determined, but not so much as thought upon. '*Firmam fidem mysteriis adhibentes, nunquam in tam sublimibus rebus, illud quomodo, aut cogitemus aut proferamus.*' For if we go about to think it or understand it we lose our labour. '*Quomodo enim id fiat, ne in mente intelligere, nec linguâ dicere possumus, sed silentio et firmâ fide id suscipimus*—We can perceive the thing by faith, but cannot express it in words nor understand with our mind,' said St. Bernard' (p). '*Oportet igitur* (it is at last, after the steps of the former progress, come to be a duty) *nos in sumptionibus divinarum mysteriorum, indubitatam retinere fidem, et non querere quo pacto.*' The sum is this: the manner was defined but very lately; there is no need at all to dispute it; no advantages by it; and therefore it were better it were left at liberty to every man to think as he please; for so it was in the church for above a thousand years together; and yet it were better men would

(i) On 1 Cor. vii. (tom. vi. col. 696 c).

(k) Neander Synops. Chron. p. 203 (at fol. 90 a, 8vo.).

(l) In Matt. xxvi. (fol. 341 b).

(m) Bibliotheca Sixt. Senensis, lib. iv. tit. Johannes Ferus (tom. 1,

p. 415).

(n) Tonsal de Eucharistia, lib. i. p. 46, 4to, Lutet. 1554.

(o) Cyril (Alex.) in Joh. lib. iv. c. 13.

(p) Epist. lxxvii.

not at all trouble themselves concerning it; for it is a thing impossible to be understood, and therefore it is not fit to be inquired after. This was their sense: and I suppose we do in no sense prevaricate their so pious and prudent council by saying 'the presence of Christ is real and spiritual,' because this account does still leave the mystery in his deepest mystery" (q).

"The sacrament of the Lord's supper," Professor Blunt observes, "is estimated as lowly as that of baptism by the Socinians. They represent it as a mere commemoration of the death of Christ, the most signal of His acts: and not possessing any virtue in itself to serve us; whatever benefits we receive from Christ being independent of it and enjoyed by us already; a doctrine in both its features different from that of our church, which maintains that the Lord's supper is a continual remembrance of the sacrifice of the death of Christ; and that in it our souls are strengthened and refreshed by the Body and Blood of Christ" (r).

Professor
Blunt.

"Let curious and sharp-witted men," says Hooker, "beat their heads about what questions themselves will; the very letter of the word of Christ giveth plain security that these mysteries do, as nails, fasten us to His very cross, that by them we draw out, as touching efficacy, force, and virtue, even the blood of His gored side; in the wounds of our Redeemer we there dip our tongues; we are dyed red both within and without; our hunger is satisfied, and our thirst for ever quenched. They are things wonderful which he feeleth, great which he seeth, and unheard of which he uttereth, whose soul is possessed of this Paschal Lamb and made joyful in the strength of this new wine. This bread hath in it more than the substance which our eyes behold; this cup, hallowed with solemn benediction, availeth to the endless life and welfare both of soul and body; in that it serveth as well for a medicine to heal our infirmities and purge our sins as for a sacrifice of thanksgiving; with touching it sanctifieth; it enlighteneth with belief; it truly conformeth us to the image of Jesus Christ. What these elements are in themselves it skilleth not; it is enough that to me which take them they are the Body and Blood of Christ. His promise in witness hereof sufficeth; His word He knoweth which way to accomplish. Why should any cogitation possess the mind of a faithful communicant but this: 'O my God, Thou art true; O my soul, thou art happy?'"

Hooker.

"Thus, therefore, we see that howsoever men's opinions do otherwise vary, nevertheless, touching baptism and the supper of the Lord, we may, with consent of the whole Christian world, conclude they are necessary, the one to initiate or begin, the other to consummate or make perfect our life in Christ" (s).

(q) Jeremy Taylor, Works, vol. vi. pp. 11—13. lecture xii. p. 554.

(r) Blunt, On the Early Fathers, c. lxvii.

(s) Hooker, Eccles. Pol. bk. v.

*Case of the
Archdeacon of
Taunton.*

It should be here observed that the *Archdeacon of Taunton* (t) was in 1854 the subject of a criminal proceeding in an ecclesiastical court constituted under 3 & 4 Vict. c. 86, for preaching doctrine alleged to be in contradiction to the 28th and 29th Articles of Religion. A commission, which refused to hear evidence, found the archdeacon *prima facie* guilty. The bishop of the diocese being patron of the living which the archdeacon held, was incapacitated from sitting as judge by an express provision of the statute last mentioned. The Archbishop of Canterbury sat with assessors lay and clerical as judge, and condemned the archdeacon and deprived him, under 13 Eliz. c. 12, of all his preferments.

From this judgment an appeal was prosecuted to the Court of Arches by the archdeacon, which court, when compelled by *mandamus* to hear the appeal, reversed the sentence upon a preliminary question as to the construction of the statute 3 & 4 Vict. c. 86, and in effect pronounced that the whole proceeding was *coram non iudice*, having taken place after the lapse of two years, the time of limitation prescribed by the statute. The promoter of the suit appealed to the Judicial Committee of the Privy Council, which sustained the sentence of the Court of Arches.

It is to be observed, however, that the appeal asserted by the archdeacon was instituted against the merits of the sentence of the archbishop, as well as against his competence to hear the cause; and as the appeal was successful upon the first point raised, there is, to say the least, no presumption against its having been equally successful upon the other points of the appeal if it had become necessary to argue them. For the archbishop's competence to hear the cause had been maintained by the court quite as unhesitatingly as his Grace's opinion upon the construction of the Articles.

The doctrine maintained by the archdeacon and condemned by the court of first instance was as follows:—

1. "That the bread and wine become, by the act of consecration, 'the outward part or sign of the Lord's Supper;' and, considered as objects of sense, are unchanged by the act of consecration, 'remaining still in their very natural substances.'"

2. "That 'the inward part or thing signified' is 'the Body and Blood of Christ.'"

3. "That 'the Body and Blood of Christ' being present naturally in Heaven, are, supernaturally and invisibly, but really, present in the Lord's Supper, through the elements, by virtue of the act of consecration."

(t) Proceedings against the Archdeacon of Taunton (Martin, London, 1857). There are many misprints and some misstatements in the report of the argument in this work; *Ex parte Denison*, 4 E. & B. p. 292; 1 Jur., N. S. p. 517; *Reg. v. Arch-*

bishop of Canterbury, 6 E. & B. p. 546; 2 Jur., N. S. p. 835; *Reg. v. Dodson*, 7 E. & B. p. 315; 3 Jur., N. S. p. 439; *Denison v. Ditcher*, Deane & Swabey, p. 334; *Ditcher v. Denison*, 11 Moore, P. C. C. p. 324.

4. "That by 'the real presence of the Body and Blood of Christ in the Lord's Supper' is not to be understood the presence of an influence emanating from a thing absent, but the supernatural and invisible presence of a thing present; of his very Body and very Blood, present 'under the form of bread and wine.'"

5. "That the 'outward part or sign' and 'the inward part or thing signified' being brought together in and by the act of consecration make the sacrament."

6. "That the sacrament—*i.e.*, 'the outward part or sign' and 'the inward part or thing signified'—is given to and is received by all who communicate."

7. "That 'in such only as worthily receive the same [the sacrament of the Body and Blood of Christ] they have a wholesome effect or operation; but they that receive them unworthily purchase to themselves damnation, as St. Paul saith.'"

8. "That worship is due to 'the Body and Blood of Christ,' supernaturally and invisibly, but really, present in the Lord's Supper, 'under the form of bread and wine,' by reason of that Godhead with which they are personally united. But that the elements, through which 'the Body and Blood of Christ' are given and received, may not be worshipped."

The case of *Sheppard v. Bennett* was decided by the judge of the Court of Arches on the 23rd of July, 1870. From this judgment an appeal was prosecuted to the Privy Council; but the decision was affirmed. *Sheppard v. Bennett.*

In that case the criminal articles charged the defendant with having promulgated certain doctrines respecting the holy communion which may be classed under the following categories:—
(1) Opinions with respect to the presence of our Lord in the blessed sacrament. (2) Opinions with respect to a sacrifice said to be offered in the administration of that sacrament. (3) Opinions with respect to the adoration of the consecrated elements and of our Lord in that sacrament (*u*).

On the first group of charges the decision of the judge of the Arches Court was thus:— In the Arches Court.

"With respect to the first and uncorrected edition of his pamphlet, I pronounce that Mr. Bennett, by his language respecting the visible presence of our Lord, and the adoration of the consecrated elements, has contravened the law of the church."

* * * * *

"With respect to the second and corrected edition of his pamphlet, and the other work for which he is articulated, I say that the objective, actual and real presence, or the spiritual, real presence, a presence external to the act of the communicant, appears to me to be the doctrine which the formularies of our church, duly considered and construed so as to be harmonious,

(*u*) L. R. 3 Adm. & Eccl. p. 167; and Special Report.

intended to maintain. But I do not lay down this as a position of law, nor do I say that what is called the receptionist doctrine is inadmissible; nor do I pronounce on any other teaching with respect to the mode of presence. I mean to do no such thing by this judgment. I mean by it to pronounce only that to describe the mode of presence as objective, real, actual and spiritual is certainly not contrary to the law."

With respect to the second group of charges the judge said as follows:—

"I am led therefore to the certain conclusion, that it is lawful for a clergyman to speak in some sense of the eucharistic sacrifice, and therefore in some sense also of the 'sacrifice offered by the priest,' and 'the sacrificial character' of the holy table. Much of Mr. Bennett's language would fall under these categories, upon the ordinary principles of construction, by which alone in this criminal suit I must be guided. With respect to any language which may be considered to go beyond this limit, I must see whether it exceeds the liberty which, according to the judgments of the Privy Council, I must hold to be accorded to all clergymen in cases where the formularies are not express, imperative and susceptible of but one interpretation."

And he found that Mr. Bennett's language did not exceed that liberty.

On the third group of charges the judge said as follows:—

"With respect to the third category, the promoter alleges that the defendant has promulgated the following doctrines:—'In or by the passage lettered H, that adoration or worship is due to the consecrated bread and wine. In or by the passages lettered N, O and S, that adoration is due to Christ, present upon the altars or communion tables of the church in the sacrament of the holy communion under the form of bread and wine, on the ground that under their veil is the sacred body and blood of our Lord and Saviour Jesus Christ.'

"Mr. Bennett in the earlier editions of his pamphlet used these expressions:—'Who myself adore and teach the people to adore the consecrated elements, believing Christ to be in them—believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ.'

"It seems to me that the first of these sentences does contravene the mind of the Church, as expressed in the declaration about kneeling, which is at the close of the Order of the Administration of the Lord's Supper; and though, as will be seen, these words are not without some countenance from considerable authority, they are in my judgment to be reprehended.

"The words of the declaration are:—'Yet, lest the same kneeling should by any persons, either out of ignorance or infirmity, or out of malice or obstinacy, be misconstrued or depraved, it is hereby declared that thereby no adoration is intended, or ought to be done, either unto the sacramental bread or wine there bodily received, or unto any corporal presence of

Christ's natural flesh and blood. For the sacramental bread and wine remain still in their very natural substances, and therefore may not be adored (for that were idolatry to be abhorred of all faithful Christians); and the natural body and blood of our Saviour Christ are in heaven, and not here; it being against the truth of Christ's natural body to be at one time in more places than one.'

"Mr. Bennett has, however, been apprised of the error into which his slight acquaintance with the subject has led him, and in his latest edition this reprehensible language is withdrawn and the following language substituted for it:—'Who myself adore and teach the people to adore Christ present in the Sacrament, under the form of bread and wine, believing that under their veil is the sacred body and blood of my Lord and Saviour Jesus Christ.'

"I have dealt with the question as to the expression 'under the form of bread and wine,' and have decided that it may be lawfully used. It remains to be considered whether to profess and teach the adoration of Christ present in the sacrament is unlawful.

"Such a doctrine is not at variance with the declaration of kneeling, which discountenances the worship of the elements and of the corporal presence of Christ.

"Nor is it repugnant to the 28th Article of Religion, as suggested by the promoter, for it contains no declaration against the adoration of the spiritual presence of Christ in the holy eucharist."

The case came twice before the Privy Council; the first time by way of appeal from an interlocutory judgment of the Court of Arches directing the criminal articles to be reformed (*x*); the second time on appeal from the final sentence (*y*). In the Privy Council.

On the first occasion the Privy Council held that the doctrine of the Real Presence is not contrary to the 29th Article of Religion. On the second occasion they confirmed Sir Robert Phillimore's decision in the Court of Arches, and acquitted Mr. Bennett. It was then holden by the Privy Council as follows:—

I. That the Church of England in her Articles, and Formularies, and Catechism holds and teaches affirmatively that in the Lord's Supper the Body and Blood of Christ are given to, taken and received by the faithful communicant. She implies therefore to that extent, a Presence of Christ in the ordinance to the soul of the worthy recipient. As to the mode of this Presence she affirms nothing except that the Body of Christ is given, taken, and eaten, in the Supper only after an heavenly and spiritual manner, and that "the mean whereby the Body of Christ is received and eaten in the Supper is faith." Any other Presence than this—any Presence which is not a Presence to the soul of the faithful receiver—the Church does not by her

(*x*) L. R. 4 P. C. p. 350.

(*y*) Ibid. p. 371.

Articles or Formularies affirm, or require her ministers to accept; and consequently the maintaining by a clergyman of a "real actual and objective" Presence of our Lord in the Sacrament of the Holy Communion "upon the altar under the form of Bread and Wine" was not, in the affirmance, a doctrine so contradictory or repugnant to the Articles or Formularies of the Church as to be properly made the ground of a criminal charge against him, and a clergyman cannot be condemned for maintaining that the change in 1662, "corporal" for the words "real and essential" in the declaration of kneeling, appended to the service of the Holy Communion, was an intentional substitution, implying that there may be a real or essential presence in contradistinction to a corporal presence, if he does not in terms allege a corporal presence of the natural Body of Christ in the Elements, or that the Body of Christ is present in a natural or corporal manner.

II. That the 31st Article of Religion, after laying down the proposition (which is adopted also in the Prayer of Consecration) that "The offering of Christ once made is that perfect redemption, propitiation, and satisfaction for all the sins of the whole world, both original and actual," and that "there is none other satisfaction for sin, but that alone," proceeds on the strength of these propositions to say that "the Sacrifice of Masses, in which it was commonly said that the priest did offer Christ for the quick and the dead to have remission of pain or guilt, were blasphemous fables and dangerous deceits. It is not lawful for a clergyman to contradict expressly or by inference either the proposition which forms the first part of the 31st Article, or any proposition plainly deducible from the doctrine as to propitiatory masses, which forms the second part of it, and is stated as a corollary to the first. Neither is it lawful for a clergyman to teach that the Sacrifice, or offering of Christ upon the Cross or the redemption, or propitiation, or satisfaction wrought by it, is or can be repeated in the ordinance of the Lord's Supper; nor that in the ordinance of the Lord's Supper there is, or can be, any Sacrifice or offering of Christ which is efficacious, in the sense in which Christ's death is efficacious, to procure the remission of guilt or the punishment of sins. The word "sacrifice" has been applied to the Lord's Supper by divines of eminence not in the sense of a true propitiatory or atoning sacrifice, effectual as a satisfaction for sin, but of a rite which calls for remembrance and represents before God that one true Sacrifice.

III. That the doctrine that adoration is due to the consecrated elements is contrary to law. The Church of England has forbidden all acts of adoration to the Sacrament, understanding by that the consecrated elements. She has been careful to exclude any act of adoration on the part of the minister, at or after the consecration of the elements, and to explain the posture of kneeling prescribed by the rubric. The 25th Article lays down that

"the Sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped." In the 25th Article it is affirmed that "the Sacraments were not ordained by Christ to be gazed upon, or to be carried about, but that we should duly use them." But in the absence of a charge of any outward act of adoration, Mr. Bennett's language was held not to be so plainly repugnant to these Articles as to warrant conviction in a penal proceeding. This last conclusion was stated to have been reached "not without doubt and division of opinions," and by the "majority of their lordships" only.

In "the statement published by authority," London, December 9, 1841, which accompanied the foundation of the Anglican bishopric in Jerusalem, was this passage:—"Germans intended for the charge of such congregations are to be ordained according to the ritual of the English Church, and to sign the articles of that church, and in order that they may not be disqualified by the laws of Germany from officiating to German congregations, they are, before ordination, to exhibit to the bishop a certificate of their having subscribed, before some competent authority, the Confession of Augsburg."

Statement on
foundation of
Anglican
bishopric at
Jerusalem.

The 10th article of this confession asserts the real presence in the plainest language:—

"De Cæna Domini docent, quod cum pane et vino vere exhibeantur corpus et sanguis Christi rescentibus in cæna Domini."

Or according to the words in another edition:—

"De Cæna Domini docent, quod corpus et sanguis Christi vere adsint, et distribuuntur rescentibus in cæna Domini; et improbant secus docentes."

CHAPTER VI.

CONFESSION.

What it is. THE sorrow for the consequences of sin which divines call attrition is distinct from the sorrow for the sin itself which they call contrition. This latter penitence naturally leads to confession, and thence or thereby to reconciliation with God, which reconciliation the Church pronounces by the sentence called absolution.

History of the ordinance. It would appear, however, that neither private confession nor private absolution was ordered in the early times of the Church—that penance was imposed after open and public confession before the offender was restored, generally by the bishop, to his former right to receive the eucharist (*a*).

Public penances (*b*), however, were gradually discontinued in mediæval times, and the practice of private confession increased, till in 1215 Innocent III. promulgated the 21st Canon of the Fourth Council of Lateran, by which “*omnis utriusque sexus*” were to confess their sins once a year at least to their parish priest. This order was enforced by provincial councils in England. The sacredness which the common law attached to such confessions will be presently considered.

At the Reformation the Church of England, without formally repealing the old canons on this subject or directly depreciating private confession, led by her ordinances to a discouragement of it as a general practice, recommending it only in particular cases.

Hooker. “It standeth with us,” Hooker says, “in the Church of England, as touching public confession, thus: First, seeing day by day we in our Church begin our public prayers to Almighty God with public acknowledgement of our sins, in which confession every man prostrate as it were before his glorious Majesty, crieth guilty against himself, and the minister with one sentence pronounceth universally all clear, whose acknowledgement so made hath proceeded from a true penitent mind; what reason

(*a*) Blunt, Dictionary of Doctrinal and Historical Theology, tit. Confession of Sins. See form of Confession and Absolution of Prisoners under Sentence of Death,

prepared by the Irish Synod of 1711 in the Irish Prayer Book of 1723, vide *supra*, p. 467.

(*b*) This subject is treated of in Part IV., Chap. X., Sect. 3.

is there every man should not, under the general terms of confession, represent to himself his own particulars whatsoever, and adjoining thereunto that affection which a contrite spirit worketh, embrace to as full effect the words of divine grace, as if the same were severally and particularly uttered with addition of prayers, imposition of hands, or all the ceremonies and solemnities that might be used for the strengthening of men's affiance in God's peculiar mercy towards them? Such complements are helps to support our weakness, and not causes that serve to procure or produce his gifts. If with us there be truth in the inward parts, as David speaketh, the difference of general and particular forms in confession and absolution is not so material, that any man's safety or ghostly good should depend upon it.

"And for private confession and absolution it standeth thus with us :—

"The minister's power to absolve is publicly taught and professed, the Church not denied to have authority either for abridging or enlarging the use and exercise of that power, upon the people no such necessity imposed of opening their transgression unto men, as if remission of sins otherwise were impossible; neither any such opinion had of the thing itself, as though it were either unlawful or unprofitable, save only for these inconveniences which the world hath by experience observed in it heretofore. And in regard thereof, the Church of England hath hitherto thought it the safer way to refer men's hidden crimes unto God and themselves only; howbeit, not without special caution for the admonition of such as come to the holy Sacrament, and for the comfort of such as are ready to depart the world" (c).

Power of minister to absolve.

Dr. Wake, Archbishop of Canterbury, who was born in 1657, and died in 1737, says, "The Church of England refuses no sort of confession, either public or private, which may be any way necessary to the quieting of men's consciences, or to the exercising of that power of binding and loosing, which our Saviour Christ has left to his church. We have our penitential canons for public offenders; we exhort men, if they have any the least doubt or scruple, nay sometimes though they have none, but especially before they receive the holy sacrament, to confess their sins. We propose to them the benefit not only of ghostly advice how to manage their repentance, but the great comfort of absolution too, as soon as they shall complete it. . . . When we visit our sick, we never fail to exhort them to make a special confession of their sins to him that ministers to them; and when they have done it, the absolution is so full, that the Church of Rome itself could not desire to add anything to it" (d).

Archbishop Wake.

(c) Hooker's Eccles. Pol. bk. vi. c. 4.

(d) Exposition of the Doctrine

of the Church of England, in Gibson's Preservative against Popery, vol. iii. p. 31.

Bishop
Berkeley.

Bishop Berkeley, who was born in 1684, and died in 1753, in a letter to Sir John James, Bart., written in 1741, on the Roman Catholic Controversy, says, "I had forgot to say a word of confession, which you mention as an advantage in the Church of Rome, which is not to be had in ours. But it may be had in our communion by any who please to have it; and I admit it may be very usefully practised" (e).

Bishop
Philpotts.

The following letter was written on this subject by the late Bishop of Exeter to the Rev. G. R. Prynne:—

"Dear Sir,

"Bishopstowe, October 9, 1852.

"As I do not think that the Church of England prohibits your receiving to confession those who seek it as an habitual practice, I do not presume to prohibit your doing so. The church seems to me to discourage such a practice; therefore I should endeavour to dissuade one who came to me in pursuance of the practice from persisting to desire it. If I had sufficient reason to believe that he had not endeavoured honestly and earnestly to quiet his own conscience by self-examination, and other acts of repentance, I should not myself admit him. More than this I must decline saying.

"Yours sincerely, H. EXETER.

"Rev. G. R. Prynne" (f).

As to the place of Confessor to the Royal Household, the following documents should be noticed:—

Confessor of
the Royal
Household.

"1625. Oct. 25th, Salisbury. Sec. Conway to Lancelot Andrewes, Bishop of Winchester. To admit Dr. Middleton to the place of confessor of the household. (Minute, Conway's Letter Book, p. 233)."

"1625. Nov. 4th, Bishop's Waltham. Bishop Andrewes, of Winchester, to Sec. Conway. Nothing has been done in the matter of the confessorship (of the household) but with the king's knowledge. Mr. Beckett, the present confessor, who was appointed by Bishop Montague, has been labouring under palsy for some years past. The king signified that he would have Mr. Beckett continue in his place for life, whereupon he was orderly sworn by Bishop Andrewes. This it was likely his

(e) "The Power of the Priesthood in Absolution, &c." by W. Cooke, M.A., publ. by Parker, 1858, Appendix, p. 59.

(f) From a letter from the Bishop of Exeter to the Dean of Exeter (published by Murray in 1852) on "Confession and Absolution," p. 43. The catalogue of divines who have written in the sense that the Church of England does not forbid private confession might be largely increased. See Appendix to the tract on "The Power of the Priesthood" already

quoted, and on the other side, "An Enquiry into the Doctrine of the Church of England on Private Confession," by the Rev. C. J. Elliott, M.A. (Rivingtons, 1859). See also "Letter to Bishop of London on the Case of Mr. Poole," by Mr. Liddell (Hayes, 1858). See also a statement by the Bishop of Nassau, in answer to an address from the lay members of a congregation in his diocese, May 25, 1871, in Nassau Guardian and Bahama Islands Advocate and Intelligencer of May 31, and Church Review of Sept. 2.

Majesty did not call to remembrance. His memory being informed, his pleasure shall be fulfilled" (*g*).

Authoritative statements of our church on this subject may be found in the Ten Articles of 1536—The Institution of a Christian Man and The Erudition for any Christian Man. But the more important references to it are derived from the following sources:—

Authoritative statements of the church.

First, from the "Exhortation to Communion" in the Order for the Holy Communion in our Prayer Books:—

Exhortation to communion.

(1). In (*h*) the "Order of the Communion" set forth in the year 1548, and (2) in the Second Prayer Book of King Edward VI. set forth A.D. 1552; at the foot of the first column the alterations of the Prayer Book of A.D. 1549, and at the foot of the second column those of the last revision of A.D. 1661.

A.D. 1548.

"And if there be any of you whose conscience is troubled and grieved in any thing, lacking comfort or counsel, let him come to me, or to some other discreet and learned priest, taught in the law of God, and confess and open his sin and grief secretly, that he may receive such ghostly counsel, advice, and comfort, that his conscience may be relieved, and that of us (*l*), as a minister of God, and of the church, he may receive comfort and absolution, to the satisfaction of his mind, and avoiding of all scruple and doubtfulness; requiring such as shall be satisfied with a general confession, not to be offended with them that doth (*n*) use, to their further satisfying, the auricular and secret confession to the priest, nor those also which think needful or convenient, for the quietness of their own consciences, particularly to open their sins to the priest, to be offended with them which (*o*) are satisfied with their humble confession to God, and the general confession to the church, but in all things to follow and keep the rule

A.D. 1552.

"And because it is requisite that no man should come to the holy communion but with a full trust in God's mercy and with a quiet conscience, therefore if there be any of you (which (*i*) by the means aforesaid) cannot quiet his own conscience, but requireth further comfort or counsel, (then (*j*)) let him come to me or (*k*) some other discreet and learned minister of God's word and open his grief (*m*), that he may receive such ghostly counsel, advice and comfort, as his conscience may be relieved, and that by the ministry of God's word he may receive comfort and the benefit of absolution, to the quieting of his conscience and avoiding of all scruple and doubtfulness."

(*g*) Calendar of State Papers (Domestic), 1625, 1626, pp. 133, 143. Ann, Duchess of York, first wife of James II., is said to have been, whilst a member of the Church of England, in the habit of auricular confession.

(*h*) From Mr. Elliott's tract just quoted.

(*i*) "Who by this means," 1662.

(*j*) "Then," omitted, 1662.

(*k*) "To," 1662.

(*l*) "As of the ministers," 1549.

(*m*) "That by the ministry of God's holy word he may receive the benefit of absolution together with ghostly counsel."

(*n*) "Do," 1549.

(*o*) "That," 1549.

of charity; and every man to be satisfied with his own conscience, not judging other men's minds or acts (*p*), whereas he hath no warrant of God's word for (*q*) the same" (*r*).

Visitation of the sick.

Secondly, from the Order for the Visitation of the Sick in the Prayer Books:—

1549.	1552.	1661.
Here shall the sick person make a special confession	Here shall the sick person make a special confession	Here shall the sick person be moved to make a special confession of his sins
if he feel his conscience troubled with any weighty matter. After which confession the priest shall absolve him	if he feel his conscience troubled with any weighty matter. After which confession the priest shall absolve him	if he feel his conscience troubled with any weighty matter. After which confession the priest shall absolve him (if he humbly and heartily desire it)
after this form: and the same form of absolution shall be used in all private confessions.	after this sort.	after this sort.

The insertion in the last Prayer Book of the words "be moved to" denote an increased sense of the importance of confession and absolution in the cases to which the Rubric applies.

Homily of repentance.

Thirdly, from a passage in the second part of the Homily of Repentance, in which it is said, "I do not say but that if any do find themselves troubled in conscience, they may repair to their learned curate or pastor, or to some other godly learned man, and show the trouble and doubt of their conscience to them, that they may receive at their hands the comfortable salve of God's word. . . ."

Canon 67.

Fourthly, the 67th Canon of 1603 having required the minister to visit sick people, "to comfort and instruct them in their distress," the 113th Canon enacts as follows:—

Canon 113.

"Because it often cometh to pass that the church-wardens, side-men, quest-men and such other persons of the laity, as are

(*p*) "Consciences," 1549.

(*q*) "To," 1549.

(*r*) In the Irish convocation of 1634 (when Usher was Primate of Armagh and Bramwell Bishop of Derry) the 19th Canon ordered that, "The minister of every parish shall, the afternoon before the said administration (of the Lord's Supper) give warning by the tolling of the bell, or otherwise, to the intent, that if any have any scruple of conscience, or desire the special ministry of reconciliation, he may afford it to those that need it. And to this end the people are often to

be exhorted to enter into a special examination of the state of their own souls; and finding themselves either extremely dull, or much troubled in mind, they do resort to God's ministers to receive from them as well advice and counsel for the quickening of their dead hearts and the subduing of those corruptions whereunto they have been subject; as the benefit of absolution likewise for the quieting of their conscience by the power of the keys, which Christ hath committed to his ministers for that purpose."

to take care for the suppressing of sin and wickedness in their several parishes, as much as in them lieth, by admonition, reprehension, and denunciation to their ordinaries, do forbear to discharge their duties therein, either through fear of their superiors, or through negligence, more than were fit, the licentiousness of these times considered, we ordain That hereafter every parson and vicar, or in the lawful absence of every parson or vicar, then their curates and substitutes may join in every presentment with the said church-wardens, side-men and the rest above mentioned at the times hereafter limited, if they the said church-wardens and the rest will present such enormities as are apparent in the parish; or if they will not, then every such parson and vicar, or in their absence, as aforesaid, their curates may themselves present to their ordinaries at such times, and when else they think it meet, all such crimes as they have in charges or otherways, as by them (being the persons that should have the chief care for the suppressing of sin and impiety in their parishes) shall be thought to require due reformation. Provided always, that if any man confess his secret and hidden sins to the minister for the unburdening of his conscience, and to receive spiritual consolation and ease of mind from him, we do not any way bind the said minister by this our constitution, but do straitly charge and admonish him, that he do not at any time reveal and make known to any person whatsoever any crime or offence so committed to his trust and secrecy (except they be such crimes as by the laws of this realm his own life may be called into question for concealing the same,) under pain of irregularity."

It is, perhaps, not easy to understand what crimes are here intended. But we are now brought to the consideration of a very important civil incident, so to speak, of private confession.

According to the common law of England, both civil and ecclesiastical, before the reign of Henry the Eighth, confession was holden to be sacred and inviolable. No court of justice compelled the confessor to reveal what had been communicated to him by the penitent.

Most (s) English writers (t) on the law of evidence have maintained that since the Reformation the rule of professional confidence no longer applies to confessions made to a priest, which have ceased to be within the protection of law; and

Whether confessions admissible in evidence.

(s) See "The Privilege of Religious Confessions in English Courts of Justice," considered in a letter to a friend, by E. Badeley, Esq., M.A., Barrister-at-Law (Butterworths, 1865), which may be said to exhaust this subject. The learning and accuracy of the writer are well known.

(t) Peake, *Compendium of the Law of Evidence*, p. 175; Starkie on the *Law of Evidence*, p. 40; Phillips and Arnold on the *Law of Evidence*, i. p. 109; Taylor on *Evidence*, i. pp. 787-789 [sects. 916, 917]; Roscoe, *Digest of the Law of Criminal Evidence*, p. 154.

that they must be revealed when duly demanded in a court of justice. It has happened, I think, both that the adjudged cases (*u*) relied upon do not, when carefully examined, sustain this position, and also that some of these learned writers have perhaps relied too much on the authority of their predecessors. The grave importance of the question can scarcely be over-rated.

Mr. Best's
opinion.

The law upon this point appears to me to be laid down with accuracy and fulness by Mr. Best (*x*) in his treatise "Principles of the Law of Evidence." He says:—"§ 583—(3). Whether communications made to spiritual advisers are, or ought to be, protected from disclosure in courts of justice presents a question of some difficulty. It is commonly thought that the decisions of the judges in the cases of *R. v. Gilham* (*y*) and *R. v. Wild* (*z*), added to some others that will be cited presently, have resolved this question in the negative; and the practice is in accordance with that notion. But *R. v. Gilham* only shows that a confession of guilt made by a prisoner in consequence of the spiritual exhortations of a clergyman that it will be for his soul's health to do so, is receivable in evidence against him,—a decision perfectly well founded, because such exhortations cannot possibly be considered 'illegal inducements to confess.' For by this expression, as shown in a former chapter, the law means language calculated to convey to the mind of a person accused or suspected of an offence, that by acknowledging guilt he will better his position with reference to the temporal consequences of that offence. And the ground on which a confession made after such an inducement to confess is rejected is the reasonable apprehension that in consequence of it, the party may have been led to make a false acknowledgment of guilt—an argument wholly inapplicable where he is only told that, by his avowing the truth, a spiritual benefit will accrue to him. *R. v. Wild* is even less to the purpose; as the party who used the exhortation there neither was, nor professed to be, a clergyman. The other cases to which allusion has been made are an anonymous one in *Skinner* (*a*), *R. v. Sparkes* (*b*), *Butler v. Moore* (*c*), and *Wilson v. Rastall* (*d*). In the first the question was respecting a confidential communication to a man of law, which

(*u*) *Sparkes v. Sir Hugh Middleton*, 1 Keb. p. 505; *Cuts v. Pickering*, *Jones v. The Countess of Manchester*, 1 Vent. p. 197; *Anon.*, Skin. p. 404; Bac. Abr. tit. Evidence, A. 2; *Vaillant v. Dodemead*, 2 Atk. p. 524; *The Duchess of Kingston's case*, 20 State Trials, p. 573; *Rex v. Sparkes*, cited in 1 Peake Ca. p. 109; *Wilson v. Rastall*, 4 T. R. p. 753; *Rex v. Gilham*, 1 Moo. C. C. p. 186; *Rex v. Wild*, 1 Moo. C. C. p. 452; *Butler*

v. Moore, Macnally on Evidence, p. 253. These cases are considered in the following extract from Mr. Best's work.

(*x*) Page 690.

(*y*) 1 Moo. C. C. p. 186.

(*z*) Ibid. p. 452.

(*a*) *Anon.*, Skin. p. 404.

(*b*) Cited in *Du Barré v. Livette*,

1 Peake, Ca. p. 109.

(*c*) Macnally on Evidence, p. 253.

(*d*) 4 T. R. p. 753.

Lord Chief Justice Holt, as might have been expected, held privileged from disclosure; adding *obiter* that it was otherwise 'in the case of a gentleman, parson, &c.' The second and third are decisions, one by Buller, J., on circuit, and the other by the Irish Master of the Rolls, that confessions to a Protestant or Roman Catholic clergyman are not privileged; and in the fourth, the judges in *banc* say *obiter*, that the privilege is confined to the cases of counsel, solicitor and attorney. How far a particular form of religious belief being disfavoured by law at the period (A.D. 1802) affected the decision in *Butler v. Moore*, is not easy to say; but both that case and *R. v. Sparkes* leave the general question untouched; and on the latter case being cited to Lord Kenyon, in *Du Barré v. Livette (e)*, he said, 'I should have paused before I admitted the evidence there admitted.' He, however, decided that case on the ground that confidential communications to a legal adviser were distinguishable from others. It is also to be observed, that the subject coming incidentally before Best, C. J., in *Broad v. Pitt (f)*, very shortly after *R. v. Gilham*, he referred to that case as deciding that the privilege in question did not apply to a clergyman; but added, 'I, for one, will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them in evidence.' In a case of *R. v. Griffin (g)*, tried before Alderson, B., at the Central Criminal Court, part of the evidence against the accused consisted of certain conversations between her and her spiritual adviser, the chaplain of a workhouse, relative to the transaction which formed the subject of accusation. On this evidence being offered, the judge expressed a strong opinion that it was not receivable, adding, however, 'I do not lay this down as an absolute rule; but I think such evidence ought not to be given;' and the counsel for the prosecution accordingly withdrew it. The case is not fully reported, and the result is not stated."

And lastly, in *R. v. Hay (h)*, where the prisoner was indicted for stealing a watch, the watch was traced to the possession of a Roman Catholic priest, who was called as a witness for the prosecution; and who, on being asked, "From whom did you receive that watch," refused to answer, as he said he "received it in connection with the confessional." Hill, J., ruled that he was bound to answer, on the ground that by the above question he was not asked to disclose anything stated to him in the confessional: a decision apparently unimpeachable in itself, but which leaves the general question untouched.

"§ 584. There cannot, we apprehend, be much doubt that previous to the Reformation, statements made to a priest under the seal of confession were privileged from disclosure, except, perhaps, when the matter thus communicated amounted to high

(e) 1 Peake, Ca. p. 108.

(f) 3 C. & P. p. 518.

(g) 6 Cox, C. C. p. 219.

(h) 2 F. & F. p. 4.

treason. In the old laws of Hen. I. (i) is this passage, '*Caveat sacerdos ne de hiis qui ei confitentur peccata sua alicui recitet quod ei confessus est, non propinquis nec extraneis; quod si fecerit, deponatur, et omnibus diebus vite sue ignominiosus peregrinando pœniteat.*' The laws of Hen. I. are of course not binding *per se*, and are only valuable as guides to the common law, but it is otherwise with the statute *Articuli Cleri* (9 Edw. II.), c. 10, which is as follows:—'*Quandoque aliqui confugientes ad ecclesiam dum sunt in ecclesiâ custodiuntur per armatos infrâ cimiterium, et quandoque infrâ ecclesiam, ita arte quod non possunt exire locum sacrum causâ superflui ponderis deponendi, nec permittitur eis necessaria victui ministrari. Responsio: dum sunt in ecclesiâ, custodes eorum non debent morari infrâ cimiterium, nisi necessitas vel evasionis periculum hoc requirat. Nec arcentur confugi dum sunt in ecclesia, quin possint habere vite necessaria, et exire libere pro obsceno pondere deponendo. Placet etiam Domino Regi ut latrones appellatores, quandocumque voluerint, possint sacerdotibus sua facinora confiteri; set caveant confessores ne erronee hujusmodi appellatores informant.*' In commenting on this statute, Sir Edward Coke writing, be it remembered, after the Reformation, expresses himself as follows (k):—'*Latrones vel appellatores.* This branch extendeth only to thieves and approvers indicted of felony, but extended not to high treasons; for if high treason be discovered to the confessor, he ought to discover it, for the danger that thereupon dependeth to the king and the whole realm, therefore this branch declareth the common law, that the privilege of confession extendeth only to felonies: and albeit, if a man indicted of felony becometh an approver, he is sworn to discover all felonies and treasons, yet is he not in degree of an approver in law but only of the offence whereof he is indicted; and for the rest, it is for the benefit of the king to move him to mercy. So, as this branch beginneth with thieves, extendeth only to approvers of thievery or felony, and not to appeals of treason; for, by the common law, a man indicted of high treason could not have the benefit of clergy (as it was holden in the king's time, when this act was made), nor any clergyman privilege of confession to conceal high treason: And so it was resolved in 7 Hen. V. (Rot. Parl. anno 7 Hen. V. nu. 13); whereupon friar John Randolph, the Queen Dowager's confessor, accused her of treason, for compassing of the death of the king: And so it was resolved in the case of Henry Garnet (Hil. 3 Jac.), superior of the Jesuits in England, who would have shadowed his treason under the privilege of confession, &c., and albeit this act extendeth to felonies only, as hath been said, yet the caveat given to the confessors is observable, *ne erronee informant.*' This passage has been cited to prove the common law on this subject; but it is very doubtful whether the caveat at the end of the above

(i) Leges Hen. 1. c. 5, § 17.

(k) 2 Inst. p. 629.

enactment was inserted to warn the confessor against disclosing the secrets of the penitent to others. The grammatical construction and context seem to show that it was to prevent his abusing his privilege of access to the criminal by conveying information to him from without, and the clause is translated accordingly in the best editions of the statutes.

"§585. If it be an error to refuse to hold sacred the communications made to spiritual advisers, an opposite and greater one is the attempt to confine the privilege to the clergy of some particular creed. Courts of municipal law are not called on to determine the truth or merits of the religious persuasion to which a party belongs; or to inquire whether it exacts auricular confession, advises, or permits it; the sole question ought to be whether the party who *bonâ fide* seeks spiritual advice should be allowed it freely. By a statute of New York, 'No minister of the Gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination.' A similar statute exists in Missouri, Wisconsin, Michigan, and Iowa, and the like principle is recognized in France" (1).

It seems to me at least not improbable that, when this question is again raised in an English court of justice, that court will decide it in favour of the inviolability of the confession, and expound the law so as to make it in harmony with that of almost every other Christian state. Probable decision.

(1) Bonnier, *Traité des Preuves*, § 179, who adds, "Le système contraire détruirait la confiance, qui seule peut amener le repentir, en

donnant au prêtre les apparences d'un délateur, d'autant plus odieux qu'il serait revêtu d'un caractère sacré."

CHAPTER VII.

MARRIAGE.

- SECT. 1.—*General Law as to the Celebration of Marriage.*
 2.—*Conditions Precedent—Consent, Physical and Mental Capacity, Cultus Disparitas.*
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SECT. 1.—*General Law as to the Celebration of Marriage.*

General
character.

“*Nuptiæ sunt conjunctio maris et fœminæ, et consortium omnis vitæ, divini et humani juris communicatio*” (a). “*Nuptiæ autem sive matrimonium est viri et mulieris conjunctio individuum vitæ consuetudinem continens*” (b).

In this admirable language did the Roman jurists express the distinction taught by heaven-inspired morality, by reason, and the usage of civil life, between the holy estate of matrimony and the transient union of man and woman for the mere gratification of animal passion. So our Prayer Book says that marriage “is not by any to be enterprised, nor taken in hand, unadvisedly, lightly, or wantonly, to satisfy men’s carnal lusts and appetites, like brute beasts that have no understanding” (c).

(a) Dig. lib. xxiii. tit. 2. 1.

(b) Inst. lib. i. 9, 1; Tacitus in his *Germania* (18), says, “*Severa illic matrimonia, nec ullam morum partem magis laudaveris. Nam prope soli barbarorum singulis uxoribus*

contenti sunt, exceptis admodum paucis, qui non libidine, sed ob nobilitatem, plurimis nuptiis ambiuntur.”

(c) The form of solemnization of matrimony.

The Christian law did not affect the civil status and relations of marriage (*d*), but superadded to it a religious character, and proclaimed it to be an ordinance of God (*e*). Christian law,

It was obvious that the Christian law would desire marriage to be solemnized openly and in the congregation of the faithful, though it might not require such public solemnization as essential to the validity of the bond, and such we find to be the case. Tertullian (*f*), writing in the third century, observes: “*Ideo penes nos occultæ quoque conjunctiones, id est non prius apud ecclesiam professæ juxta mæchiam et fornicationem judicari periclitantur.*” While in the early collection of canon law we find it laid down that the secrecy of the solemnization did not affect the jural or legal validity of the contract. “*Si donationum ante nuptias, vel dotis instrumenta defuerint, pompa etiam, aliæque nuptiarum celebritas omittatur, nullus existimet ob id, deesse rectè alias inito matrimonio, firmitatem, vel ex eo natis liberis jura posse legitimorum auferri, si inter pares honestate personas, nullâ lege impediende fiat consortium, quod ipsorum consensu atque amicorum fide firmetur*” (*g*). desired open solemnization.

The church early recognized the fact that in blessing and sanctifying the estate of matrimony it blessed and sanctified the whole relation of family (*h*). The Roman church afterwards raised this contract to the rank of a sacrament. Our own church, while denying that it possessed the indispensable characteristic of a sacrament of the Gospel, namely, that it was ordained as such by our Lord, has always recognized the special sanctity of the religious rite by which it ought to be solemnized. Sanctity of rite.

It is remarkable that the civil legislation of the Roman emperors, even after they had become Christians, was founded upon heathen principles, and the laws of Justinian recognized the liberty of husband and wife to dissolve the contract by mutual consent, and retained many provisions of the early Roman law (*i*) which were incompatible with the Christian character of the contract (*k*). Civil law of Rome.

Meanwhile the church, chiefly under the influence of St. Augustine, began, especially after the fifth century, comparatively regardless of the civil consequences of this contract of contracts, and apart from the provisions of secular legislation respecting it, to invest the marriage bond more and more with a religious character. It was not till after the reign of Justinian that in the East any approach was made to harmony between Law of the church.

(*d*) Matt. xix. 3—9; Mark, x. 2—12.

(*g*) Codex, lib. v. 4, 22.

(*h*) Ephes. v. 22—25; 1 Tim. ii. 15.

(*e*) See *Hyde v. Hyde and Woodmansee*, a case where Lord Penzance refused to recognize as valid a Mormon marriage, L. R. 1 P. & D. p. 130.

(*i*) It is not very easy to ascertain what the practice of the Greek church as to divorce *à vinculo* has been and is.

(*f*) De Pudicitia, c. 4, cited by Eichhorn *Gründsatze des Kirchenrechts*, ii. 297.

(*k*) Nov. 22, cap. 4; cf. Nov. 117, cap. 8.

the civil and ecclesiastical regulations on this subject. In the ninth century the civil and ecclesiastical law on this subject became one, the latter having absolved the former (*l*).

Sources of
that law.

Since this period the general marriage law of the European continent has been derived from the decrees of councils of the church and the edicts of emperors, till the epoch of the Reformation.

Judgment of
Lord Stowell.

Lord Stowell, a great master of this as of other branches of jurisprudence, has observed as follows:—"The opinions which have divided the world, or writers at least, on this subject, are generally, two. It is held by some persons that marriage is a contract merely civil, by others, that it is a sacred, religious and spiritual contract, and only so to be considered. The jurisdiction of the Ecclesiastical Court was founded on ideas of this last described nature; but in a more correct view of the subject, I conceive that neither of these opinions is perfectly accurate. According to juster notions of the nature of the marriage contract, it is not merely either a civil or religious contract; and at the present time it is not to be considered as originally and simply one or the other. It is a contract according to the law of nature antecedent to civil institutions, and which may take place to all intents and purposes, wherever two persons of different sexes engage, by mutual contracts to live together. Our first parents lived not in political society, but as individuals, without the regulations of any institutions of that kind. It is hardly necessary to enter something of a protest against the opinion, if such opinion exists, that a mere commerce between the sexes is itself marriage. A marriage is not every casual commerce; nor would it be so even in the law of nature. A mere casual commerce, without the intention of cohabitation, and bringing up of children, would not constitute marriage under any supposition. But when two persons agree to have that commerce for the procreation and bringing up of children, and for such lasting cohabitation—That, in a state of nature, would be a marriage, and in the absence of all civil and religious institutions might safely be presumed to be, as it is popularly called, a marriage in the sight of God. It has been made a question how long the cohabitation must continue by the law of nature, whether to the end of life? Without pursuing that discussion, it is enough to say that it cannot be a mere casual and temporary commerce, but must be a contract at least extending to such purposes of a more permanent nature, in the intention of the parties—The contract thus formed in the state of nature is adopted as a contract of the greatest importance in civil institutions, and it is charged with a vast variety of obligations merely civil. Rights of property are attached to it on very different principles in different countries; in some there

The nature of
the marriage
contract.

(*l*) See Esmein, *Le Mariage en droit Canonique*, a learned and valuable work.

is a *communio bonorum*; in some each retain their separate property. . . . Marriage may be good independent of any considerations of property, and the *vinculum fidei* may well subsist without them. In most countries it is also clothed with religious rites, even in rude societies, as well as in those which are more distinguished for their civil and religious institutions. Yet in many of these societies they may be irregular, informal, and discountenanced on that account, yet not invalidated. . . . The rule prevailed in all times, as the rule of the canon law, which existed in this country and in Scotland till other civil regulations interfered in this country; and it is the rule which prevails in many countries of the world, at this day, that a mutual engagement or betrothment is a good marriage, without consummation, according to the law of nations, and binds the parties accordingly, as the terms of other contracts would do, respecting the engagements they purport to describe. If they agree, and pledge their troth to resign to each other the use of their persons for the purpose of raising a common offspring, by the law of nature that is complete. It is not necessary that actual use and possession should have intervened to complete the *vinculum fidei*. The *vinculum* follows on the contract without consummation, if expressed in present terms; and the canon law itself, with all its attachment to ecclesiastical forms, adopts this view of the subject, as is well described by Swinburne in his book on Espousals, where he says, ‘that it is a present and perfect consent, the which alone maketh matrimony,’ without either public solemnities or carnal copulation; for neither is the one, nor the other the essence of matrimony, but consent only.” Later on he says that a mere contract, *per verba de presenti*, in the Christian church was a perfect contract of marriage, “though the public celebration was afterwards required by the rules and ordinances of the canon law.” And “Systems of law receive different modifications by the laws of different communities. There are principles of marriage law generally prevailing in Europe; but the canon law subsists under very different modifications in different countries, according as the different institutions of the countries in which it is received operate upon it” (*m*).

Contract *per verba de presenti*.

In another case the same learned judge says as follows:—“In the Christian church marriage was elevated in a later age to the dignity of a sacrament, in consequence of its divine institution, and of some expressions of high and mysterious import respecting it contained in the sacred writings. The law of the church, the canon law (a system which, in spite of its absurd pretensions to a higher origin, is in many of its provisions deeply enough founded in the wisdom of man), although, in conformity to the prevailing theological opinion, it revered marriage as a sacrament, still so far respected its natural and civil origin,

Intervention of a priest.

as to consider, that where the natural and civil contract was formed, it had the full essence of matrimony, without the intervention of the priest; it had even in that state the character of a sacrament; for it is a misapprehension to suppose that this intervention was required as matter of necessity, even for that purpose, before the Council of Trent. It appears from the histories of that council, as well as from many other authorities, that this was the state of the earlier law, till that council passed its decree for the reformation of marriage: the consent of two persons, expressed in words of present mutual acceptance, constituted an actual legal marriage, technically known by the name of *sponsalia per verba de presenti*. . . . At the Reformation, this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being a divine institution in its general origin, and on that account, as well as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony; but it likewise retained those rules of the canon law which had their foundation not in the sacrament or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognizance of matrimonial causes, enforced these rules, and amongst others, that rule which held an irregular marriage, constituted *per verba de presenti*, not followed by any consummation shown, valid to the full extent of avoiding a subsequent regular marriage contracted with another person" (n).

Regular and
irregular
marriages.

"Different rules, (says Lord Stowell, speaking of the canon law) relative to their respective effects in point of legal consequence applied to these three cases—of regular marriages, of irregular marriages, and of mere promises and engagements. In the regular marriage everything was presumed to be complete and consummated, both in substance and ceremony—In the irregular marriage, *i. e.*, '*sponsalia per verba de presenti*,' everything was presumed to be complete and consummated in substance but not in ceremony; and the ceremony was enjoined to be undergone as a matter of order—In the promise or *sponsalia de futuro*, nothing was presumed to be complete or consummated either in substance or in ceremony. Mutual consent would release the parties from their engagements, and one party, without the consent of the other, might contract a valid marriage, regu-

(n) *Dalrymple v. Dalrymple*, 2 Consist. p. 46. The following references to the canon law establish Lord Stowell's opinion, that the absence of the solemnities prescribed by that law did not vitiate a marriage once contracted; X. iv. 3, De clandestina desponsatione, 2; Ibid. 1, De sponsalibus et matrimoniis, 30, 31, 32; Ibid. 3, De sponsa duorum, 3; Ibid. 2, De

desponsatione impuberum, 12; Ibid. 17, Qui filii sunt legitimi, 1—6; 16 Q. 5. The innovation introduced by the Council of Trent is to be found in sess. 24, c. 1, Conc. Trid. For the existing law upon this subject in the Protestant states of Germany, Böhmer, Inst. lib. iv. tit. 3, §§ 38—50, and Scholt. Eherecht, §§ 158—167, should be consulted.

larly or irregularly, with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into an irregular marriage, and to produce all the consequences attributable to that species of matrimonial connection. . . . The reason of these rules is manifest enough. In proceedings under the Canon Law, though it is usual to plead consummation, it is not necessary to prove it, because it is always to be presumed in parties not shown to be disabled by original infirmity of body. In the case of a marriage *per verba de presenti*, the parties there also deliberately accepted the relation of husband and wife, and consummation was presumed naturally following the acceptance of that relation, unless controverted in like manner. But a promise *per verba de futuro* looked to a future time; the marriage which it contemplated might perhaps never take place. It was defeasible in various ways; and therefore consummation was not to be presumed; it must either have been proved or admitted. Till that was done, the relation of husband and wife was not contracted: it must be a promise *cum copulâ*, that implied a present acceptance, and created a valid contract founded upon it. Such was the state of the canon law, the known basis of the matrimonial law of Europe" (o).

Practically speaking, the whole learning as to irregular marriages was swept away by 26 Geo. 2, c. 33 (p), and the subsequent acts.

Scotland and Ireland (q) have their own laws as to the celebration of marriage. Marriages abroad may be lawfully celebrated according to the *lex loci*—and under the provisions of the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23) (r). The latter marriages, however, though by express enactment legal in this country, are not necessarily so holden by foreign countries, especially where the interests of foreign subjects are concerned.

Marriage in Scotland, Ireland, and abroad.

(o) *Dalrymple v. Dalrymple*, 2 Consist. p. 65.

(p) See Dr. Phillimore's note to the case of *Baxter v. Buckley*, in his edition of Sir G. Lee's Ecclesiastical Cases, vol. i. p. 42.

(q) *Dalrymple v. Dalrymple*, 2 Consist. p. 54; see 19 & 20 Vict. c. 96, as to when irregular marriages in Scotland shall be valid: *Reg. v. Millis*, 10 Cl. & Fin. p. 534; 3 & 4 Will. 4, c. 102, removing penal enactments against

Roman priests for celebrating marriages in Ireland: *Bruce v. Burke*, 2 Add. p. 471; *Steadman v. Powell*, 1 Add. p. 58; *Scrimshire v. Scrimshire*, 2 Consist. p. 401; *Rex v. Inhabitants of Brompton*, 10 East, p. 282. But the law as to marriage in Ireland was finally settled in 1870 by 33 & 34 Vict. c. 110. See also 34 & 35 Vict. c. 49.

(r) Vide infra, Sect. VIII. of this chapter.



SECT. 2.—*Conditions Precedent—Consent, Physical and Mental Capacity—Cultus disparitas.*

Requisites of marriage.

According to the general law, which the reason of the thing, the practice of the early church, the legislation of the civil and the canon law, have combined to establish, certain conditions are requisite for the due completion of the contract of marriage. The municipal law of different states has embodied in different forms these conditions.

Consent of parties.

First. Mutual free consent is the first condition of marriage. "*Ubi non est consensus utriusque non est conjugium*," "*Consensus non concubitus facit matrimonium*," are unquestionable maxims of jurisprudence upon this point.

Deaf and dumb.

It has been considered, however, that this consent may be expressed by signs, and through procurators or agents when the principal parties are absent. The law of England has no provision for the latter case; but there is no doubt that deaf and dumb persons may duly express their consent (*s*). This condition excludes of course the insane persons and those acting under duress and constraint.

Our old ecclesiastical law says—"The ministers shall frequently denounce to those who are desirous to contract matrimony, that on pain of excommunication they do not contract matrimony, but in an open place, and before divers witnesses in public" (*t*).

Necessary age.

The law as to the incapacity of children is thus expressed in the Decretum:—

"*Ubi non est consensus utriusque, non est conjugium. Ergo qui pueris dant puellas in cunabulis, et e converso nihil faciunt, nisi uterque puerorum, postquam venerit ad annos discretionis, consentiat, etiamsi pater et mater hoc fecerint et voluerint*" (*u*).

This constitution was by the council of Westminster, in the year 1175, made a portion of our law. The age of consent for espousals, of which our present law takes no notice, was seven years; when infancy in both sexes was supposed to end. As to the completion of the contract the age has been considered twelve in the woman, fourteen in the man (*x*).

Previously to the passing of the first Marriage Act (26 Geo. 2, c. 33), consent given by males of fourteen years and females of twelve was holden to be valid (*y*). But this statute fixed the

(*s*) 30 Q. 2; X. iv. 1, 23, "*Mutus et surdus, &c. Sufficit ad matrimonium solus consensus eorum, &c., &c., cum quod verbis non potest signis valeat declarare*;" Swinburne, Treatise of Spousals or Matrimonial Contracts, Sect. XV.; *Harrod v. Harrod*, 1 Kay & J. p. 4.

(*t*) Lind. p. 271.

(*u*) 30 Q. 1.

(*x*) The canon law to be consulted on this subject will be found principally in X. iv. 1, *De sponsalibus et matrimonio*; Ibid. 3, *De clandestinâ desponsatione*; VI. 4, 2, *De desponsatione impuberum*. See, too, Dig. xxiii. 1, 14; Cod. v. 60, 3.

(*y*) *Arnold v. Earle*, 2 Lee, p. 531; 1 Inst. p. 33a; 2 Inst. p. 434; 3 Inst. pp. 88, 89.

legal age of consent for both parties at twenty-one years, and made marriages between parties under this age without the consent of parents or guardians void. Later statutes require the consent of parents or guardians for minors, but do not go the length of invalidating a marriage solely on account of the absence of such consent (z).

The previous consent of parents or guardians is, if we consider only the reason of the thing and the nature of the institution, not an indispensable condition of the validity of the marriage bond. The early Christians apparently followed the law of Justinian with respect to marriages contracted without the consent of parents, and pronounced them invalid, because the Roman law required such consent as indispensable, at least for all children under the *patria potestas* (a). In the canon law the same doctrine is to be found (b). The Council of Trent, however, anathematises all those who affirm that marriages contracted with the free consent of both parties without the consent of parents are invalid.

Consent of
parents.

As to the consent required in the case of illegitimate minors, Lord Stowell made these observations in the case of *Horner v. Horner* :—

“But taking it to be sufficiently settled, as I conceive it is, that moral restraints do attach upon natural consanguinity, yet certainly it is not to be expected that the absolute necessity of parental consent to the validity of the marriage contract is considered in law, as of more than of positive and civil institution. Nothing belongs to the validity of the contract naturally, (as far as it has usually been considered and treated by most human laws), but the consent of the parties themselves, if they are of an age capable of executing the duties of that contract. . . . For nothing can be more clear than that, by the universal matrimonial law of Europe before the Reformation, the consent of parents was not required *de necessitate* to the validity of the contract. Upon this footing, the matter continues in every country in Europe holding communion with the Church of Rome, except where regulations merely civil have in later times introduced a novel and peculiar law upon the subject. Upon this footing the matter remained in many Protestant states after the Reformation; it so remained among ourselves till the time of the marriage Act (c), and nothing can more clearly show than that very act how much human law is in the habit of considering the interposition of the parent’s consent as of civil institution only. . . . Nothing can more satisfactorily

In the case of
illegitimate
minors.

(z) The language being directory only: *Rex v. Birmingham*, 8 B. & C. p. 29.

(a) Inst. i. 10, de nuptiis; par. 12, eod. “Si adversus ea quæ diximus aliqui coierint; nec vir, nec uxor, nec nuptiæ, nec matrimo-

nium, nec dos intelligetur.” Ibid.

(b) “Sponsus et sponsa cum benedicendi sunt a sacerdote, a parentibus suis, vel a paranympis offerantur:” 30 Q. 5. 5; cf. 30 Q. 3, 4.

(c) 26 Geo. 2, c. 33.

prove how much the matter has been treated and moulded as under the entire dominion of mere civil prudence." The want of such consent was, as ecclesiastical lawyers say, an *impedimentum impeditivum*, an impediment which threw an obstruction in the way of the celebration of marriage; but not an *impedimentum dirimens*, an impediment which at all affected the validity of the marriage if it was once solemnized.

Consent of
guardians.

In a previous passage in the same judgment he had said, "As to the consent of the guardians it does not appear to have been much thought of, except in certain feudal relations, where the power of the guardians was carried to a very extravagant length, and for purposes pointing almost entirely to the interests of the guardians themselves" (*d*).

After a full consideration of the circumstances of the case, from the judgment in which these words have been quoted, Lord Stowell was of opinion that the marriage was not conformable to the Stat. 26 Geo. 2, c. 33, and consequently was null and void; that is to say, that the marriage of an illegitimate minor, after the death of the father with the consent of the mother, but without the consent of a legally appointed guardian, was invalid.

Consent may
be retracted.

"It is undoubtedly true, that consent" (the same learned judge in another case observed) "may be retracted; since the parental authority continues up to the time of marriage. This principle, however, must be taken with reasonable limitations; for it cannot be maintained that this power can be arbitrarily resumed at any moment. . . . When consent has been actually given, it will be necessary that dissent should be afterwards distinctly expressed, and that it should be proved so to have been in the clearest manner" (*e*).

Evidence of
consent.

It has been decided that a formal and written consent is not requisite, nor a personal knowledge of the party; that it must be given before the marriage is solemnized, and that the presence of the father at a marriage cured any defect arising from want of consent. And it must be always remembered that to obviate the consequences which must be most unfavourable to the issue of the marriage in case of a sentence of nullity, the court has, in the language of Lord Stowell, "in its construction of the statute, held (not without some controversies arising in other quarters), that it is necessary to prove the negative of consent in the strongest terms" (*f*).

I have referred to these judgments on the question of consent, because, although the ecclesiastical court has ceased to have

(*d*) *Horner v. Horner*, 1 Consist. p. 348. See also *Fielder v. Fielder*, 2 Consist. p. 193; *Dronney v. Archer*, 2 Phillim. p. 328; *Priestley v. Hughes*, 11 East, p. 1; *Rex v. Hodnett*, 1 T. R. p. 96; *Ward v. St. Paul*, 2 Bro. C. C. p. 583.

(*e*) *Hodgkinson v. Wilkie*, 1 Con-

sist. p. 265; *Smith v. Husar*, 1 Phillim. p. 297; *Creswell v. Cosen*, 2 Phillim. p. 283. See *Yonge v. Furze*, 26 L. J. Ch. p. 116.

(*f*) *Davis v. Jarvis*, 2 Consist. p. 173. See *Balfour v. Carpenter*, 1 Phillim. p. 222.

jurisdiction over the contract of marriage, they have some bearing on the duty, presently to be considered, of the clergyman, with respect to the celebration of marriage.

By Can. 100 of 1603, "No children under the age of one and twenty years complete shall contract themselves or marry without the consent of their parents, or of their guardians and governors, if their parents be deceased." Canon 100.

The present Marriage Act (4 Geo. 4, c. 76) enacts as follows:— 4 Geo. 4, c. 76.

Sect. 16. "The father, if living, of any party under twenty-one years of age, such parties not being a widower or widow, or, if the father shall be dead, the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them, and in case there shall be no such guardian or guardians, then the mother of such party if unmarried, and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, if any, or one of them; shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent" (g). Who are to give consent if parties under age.

Sect. 17. "In case the father or fathers of the parties to be married, or one of them, so under age as aforesaid, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them, whose consent is made necessary as aforesaid to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably or from undue motives refuse or withhold his, her, or their consent to a proper marriage, then it shall and may be lawful for any person desirous of marrying, in any of the before-mentioned cases, to apply by petition to the lord chancellor, lord keeper, or the lords commissioners of the great seal of Great Britain for the time being, master of the rolls, or vice-chancellor of England, who is and are respectively hereby empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall upon examination appear to be proper, the said lord chancellor, lord keeper, or lords commissioners of the great seal for the time being, master of the rolls, or vice-chancellor, shall judicially declare the same to be so; and such judicial declaration shall be deemed and taken to be as good and effectual to all intents and purposes as if the father, guardian or guardians, or mother of the person so petitioning had consented to such marriage." If the father of minor be *non compos mentis*, or if guardians or mother of minor be *non compos mentis*, or beyond seas.

A lady made application to the lord chancellor praying the judicial declaration of the court under this 17th section on the ground that she had received suitable proposals, and that her father unreasonably withheld his consent. The Lord Chancellor (Cottenham), after consultation with the vice-chancellor, decided Power of court under this act.

(g) *Rex v. Inhabitants of Birmingham*, 8 B. & C. p. 29; 2 Moo. & R. p. 230; *Attorney-General v. Mullay*, 4 Russ. p. 329.

that the section of the act vested the discretionary power of consent in the chancellor in the case of a mother or guardian acting in the manner alleged in the lady's petition, but in the case of a father only where he was *non compos* (h).

When marriage solemnized between parties under age contrary to this act, by false oath or fraud, the guilty party to forfeit all property accruing from the marriage.

Suit by information in Chancery.

Order of court thereon.

By sect. 23 of 4 Geo. 4, c. 76, "If any valid marriage solemnized by licence shall . . . be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, contrary to the provisions of this act, by means of such party falsely swearing as to any matter or matters to which such party is hereinbefore required personally to swear, such party wilfully and knowingly so swearing, or if any valid marriage by banns shall . . . be procured by a party thereto to be solemnized by banns between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, such party knowing that such person as aforesaid under the age of twenty-one years had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been duly published according to the provisions of this act, and having knowingly caused or procured the undue publication of banns, then and in every such case it shall be lawful for his Majesty's attorney-general (or for his Majesty's solicitor-general in case of the vacancy of the office of attorney-general) by information in the nature of an English bill in the Court of Chancery at the relation of a parent or guardian of the minor, whose consent has not been given to such marriage, and who shall be responsible for any costs incurred in such suit, such parent or guardian previously making oath as is hereinafter required, to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued or shall accrue to the party so offending by force of such marriage; and such court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, right, title, and interest in any property that shall then have accrued or shall thereafter accrue to such offending party by force of such marriage shall be secured under the direction of such court for the benefit of the innocent party or of the issue of the marriage, or of any of them, in such manner as the said court shall think fit, for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage; and if both the parties so contracting marriage shall, in the judgment of the court, be guilty of any such offence as aforesaid, it shall be lawful for the said court to settle and secure such property or any part thereof, immediately for the benefit of the issue of the marriage, subject to such provisions for the offending parties, by way of maintenance or otherwise, as the said court, under the particular circumstances of the case, shall

(h) *Ex parte I. C.*, 3 Myl. & Cr. p. 471.

think reasonable, regard being had to the benefit of the issue of the marriage during the lives of their parents, and of the issue of the parties respectively by any future marriage, or of the parties themselves, in case either of them shall survive the other: Provided also, that no such information as aforesaid shall be filed, unless it shall be made out to the satisfaction of the attorney or solicitor-general before he file the same, by oath or oaths that the valid marriage to be complained of in such information hath been solemnized in such manner, and under such circumstances as in the judgment of the said attorney or solicitor-general are sufficient to authorize the filing the information under the provisions of this act, and that such marriage has been solemnized without the consent of the party or parties at whose relation such information is proposed to be filed, or of any other parent or guardian of the minor married, to the knowledge or belief of the relator or relators so making oath, and that such relator or relators had not known or discovered that such marriage had been solemnized more than three months previous to his or their application to the attorney or solicitor-general."

Before information filed, the case to be made out to attorney-general or solicitor-general on oath.

Sect. 24 makes all previous agreements and settlements inconsistent with that which the court may direct under the previous section void.

By sect. 25 the information must be filed within one year.

By 6 & 7 Will. 4, c. 85, amended by 1 Vict. c. 22, and 3 & 4 Vict. c. 72, marriages may be contracted with religious ceremonies other than those of the church, or without any religious ceremony, or according to the ceremonies of the church under the certificate of a superintendent registrar (*i*).

6 & 7 Will. 4, c. 85.

By sect. 9, "Any person authorized in that behalf may forbid the issue of the superintendent registrar's certificate by writing at any time before the issue of such certificate the word 'forbidden' opposite to the entry of the notice of such intended marriage in the marriage notice book, and by subscribing thereto his or her name and place of abode, and his or her character, in respect of either of the parties, by reason of which he or she is so authorized; and in case the issue of any such certificate shall have been so forbidden, the notice and all proceedings thereupon shall be utterly void."

Registrars' certificate may be forbidden.

§ 10. "The like consent shall be required to any marriage in England solemnized by licence as would have been required by law to marriages solemnized by licence immediately before the passing of this act; and every person whose consent to a marriage by licence is required by law is hereby authorized to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by licence or without licence."

Like consent required for certificate as for licence.

By 19 & 20 Vict. c. 119, s. 2, "In case any party shall intend marriage, under the provisions of any of the said recited acts (*j*)

19 & 20 Vict. c. 119.

Notice of

(i) Vide *infra*, sect. 7.

(j) 6 & 7 Will. 4, c. 85; 1 Vict. c. 22, 3 & 4 Vict. c. 72.

marriage to be accompanied by solemn declaration, by one of the parties, that there is no lawful hindrance to such marriage.

Persons making wilfully false declarations to suffer penalties of perjury.

In case of fraudulent marriages, guilty party to forfeit all property accruing from the marriage.

Marriages under false pretences.

Physical capacity.

Madness.

or of this act, the party so intending marriage shall, at the time of giving . . . the notice required by the said recited acts or either of them, make and sign or subscribe a solemn declaration in writing, in the body or at the foot of such notice . . . and when either of the parties intending marriage, and not being a widower or widow, shall be under the age of twenty-one years, the party making such declaration shall further declare that the consent of the person or persons whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent to such marriage is by law required; and every person who shall knowingly or wilfully make and sign or subscribe any false declaration, or who shall sign any false notice for the purpose of procuring any marriage under the provisions of any of the said recited acts or this act, shall suffer the penalties of perjury."

By sect. 19, "If any valid marriage shall be had, under the provisions of any of the said recited acts or this act, by means of any wilfully false declaration, notice, or certificate made or obtained by either party to such marriage as to any matter in which a solemn declaration, notice, or certificate is required, it shall be lawful for her Majesty's attorney-general or solicitor-general to sue for a forfeiture of all the estate and interest in any property accruing to the offending party by such marriage, and the proceedings thereupon and the consequences thereof shall be the same as are provided in the like case with regard to marriages solemnized by licence between parties under age according to the rites of the church of England in the statute 4 Geo. 4, c. 76."

The following cases have been decided on the construction of these enactments:—

Attorney-General v. Mulla (k), *Attorney-General v. Lucas (l)*, *Attorney-General v. Clements (m)*, *Attorney-General v. Read (n)*, *Attorney-General v. Wiltshire (o)*.

No deceit practised as to the *status*, moral, civil or religious, of either party to the contract, invalidates it.

Secondly, the parties to the contract must be of an age competent to the procreation of children, which is one of the principal ends of matrimony.

The impossibility of fulfilling this end is the reason why the incurably impotent person is *incapax matrimonii*; though after a certain lapse of time, or in the case of a marriage contracted between persons of advanced age, the ecclesiastical and the civil law may justly pronounce *Habeat tanquam soror vel frater*.

Idiotcy and insanity incapacitate the person so afflicted from marrying. Mr. Justice Blackstone, speaking of the maxim once adopted by the common law, that the marriage of an idiot was

(k) 4 Russ. p. 329.

(l) 2 Phillips, p. 753.

(m) L. R. 12 Eq. p. 32.

(n) Ibid. p. 38.

(o) L. R. W. N. 1875, p. 182.

valid, observes, that it was "a strange determination, since consent is absolutely necessary to matrimony, and neither idiots nor lunatics are capable of consenting to anything. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment; though not a cause of divorce, if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic not being in a lucid interval was absolutely void" (p).

The leading case upon this subject is, *The Earl of Portsmouth v. The Countess of Portsmouth*, where a marriage, solemnized *de facto* under circumstances of clandestinity, inferring fraud and circumvention, between a person of weak and deranged mind and the daughter of his trustee and solicitor (who had great influence over him and by whom he was clearly considered as of unsound mind), was pronounced null and void, and the pretended wife condemned in costs. Sir John Nicholl, in giving judgment, said, "The law of the case admits of no controversy, and none has been attempted to be raised upon it. When a fact of marriage has been regularly solemnized, the presumption is in its favour; but then it must be solemnized between parties competent to contract, capable of entering into that most important engagement, the very essence of which is consent: and without soundness of mind there can be no legal consent; none binding in law—insanity vitiates all acts:—nor am I prepared to doubt but that considerable weakness of mind, circumvented by proportionate fraud, will vitiate the fact of marriage" (q).

In *Turner v. Meyers* (r) the husband, after his recovery, successfully instituted a suit for nullity of marriage contracted while he was insane. Lord Stowell in that case said (r), "This is a suit brought by a man to set aside his marriage on the ground of his own incapacity at the time alleged, though, at other times, he is pleaded to have been capable. The suit was first brought by the father, but the son being of age, and there being no means of making the father guardian, or *curator ad litem*, the Court was of opinion, that the suit could not proceed in that form.—It has therefore since assumed its present shape.

"It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure *dicta*, in the earlier commentators on the law (s), that a marriage of an insane person could not be invalidated on that account, founded, I presume, on some notion, that prevailed in

(p) 1 Black. Com. ed. Hargrave, *Parker v. Parker*, 2 Lee, p. 382. 1844, p. 438.

(q) *Portsmouth v. Portsmouth*, 1 Hagg. Eccl. p. 359; see also *Browning v. Redane*, 2 Phillim. p. 71;

(r) 1 Consist. p. 414.

(s) Sanchez, lib. 1, disp. 8, num. 15 et seq.

the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In more modern times, it has been considered in its proper light, as a civil contract as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons. This has been fully determined in a case before the Delegates (*t*), when the effect of all these *dicta* were brought before the Court, and it has been since acted upon in various cases (*u*) in this Court; which it is unnecessary to review. I take it to be as clear a principle of law therefore, at this day, as any can be, and as incapable of being affected by any general *dicta*, which may be found in writers of earlier periods, as any fundamental maxim, on which the Courts are in the habit of proceeding.

“When a commission of lunacy has been taken out, the conclusion against the marriage will be founded on that statute (*x*): where there has been no such commission, the matter is to be established on evidence. The statute has made provisions against such marriages, even in lucid intervals, till the commission has been superseded. In other cases, the Court will require it to be shown by strong evidence, that the marriage was clearly had in a lucid interval, if it is first found that the person was generally insane.

“Madness is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very moderate progress in investigating the texture of the mind, even in a sound state. In disease, where it has pleased the Almighty to envelope the subject matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this, something which, if there be any test, is held, by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger, when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind.”

The later cases on this subject are *Hancock v. Peaty* (*y*) where the marriage was declared null at the suit of the insane wife suing by her committee; and *Durham v. Durham*; *Hunter v. Edney*;

(*t*) *Morison v. Stewart*, falsely called *Morison*, Delegates, 1745.

(*u*) *Cloudesley v. Evans*, Prerog. 1763; *Parker v. Parker*, 1757.

(*x*) 15 Geo. 2, c. 30 (now repealed).

(*y*) L. R. 1 P. & D. p. 335.

and *Cannon v. Smalley* (z), all applications by the husband to annul marriages on account of the wife's alleged insanity. In the second case the suit was granted; in the others it was refused.

By the ancient law of England, if any Christian man did marry with a woman that was a Jew, or a Christian woman did marry with a Jew, it was felony (a). *Cultus disparitas.*

But in *Goodman v. Goodman* (b) the Court of Appeal in Chancery presumed a valid marriage between a Jew and a Christian.

It appears that the stricter Jewish teaching is that such marriages are for religious purposes invalid (c).

Where both parties are Jews, they were always allowed to marry; such marriages are expressly exempted from the operation of the Marriage Acts (d).

The Canon Law Committee of the English Church Union reported on mixed marriages, 16th June, 1891, as follows:—

1. "That a marriage contracted between a Christian on the one hand, and an unbaptized person—a Jew, a Mahomedan, or a heathen on the other—is valid but irregular.

2. "That such marriages ought to be as far as possible discouraged on account of the danger to the faith of the Christian partner, the different view which may be entertained by the other partner as to the dissolubility of the marriage bond, and the difficulty as to the education of the children.

3. "That the service of Holy matrimony not being required to make the marriage valid, ought not to be solemnized by a priest in such cases, unless with the dispensation of the Bishop.

4. "That in the event of the non-Christian partner being a person domiciled in a country where polygamy is permitted, doubts may afterwards arise whether the marriage is in fact a monogamous and valid marriage, or merely one of several polygamous marriages, and that this danger requires special caution" (e).

SECT. 3.—*Conditions Precedent—Incapacity to contract within prohibited Degrees.*

Persons within the prohibited degrees are incapable of contracting marriage.

Incapacity to contract.

(z) All reported together at 10 P. D. p. 81.

(a) 3 Inst. p. 89. See Fleta, p. 54.

(b) 5 Jur. N. S. p. 902; 28 L. J. Ch. p. 745.

(c) See article, De la nullité selon le droit hébraïque du mariage contracté entre un Juif et une femme d'une autre religion.—

Journal du droit international privé. Vol. XX. p. 1101.

(d) 26 Geo. 2, c. 33, s. 18, now repealed; 4 Geo. 4, c. 76, s. 31; 6 & 7 Will. 4, c. 85, s. 2; 3 & 4 Vict. c. 72, s. 5; and see 19 & 20 Vict. c. 119, s. 21.

(e) Church Union Gazette, July, 1891.

Levitical and
prohibited
degrees.

25 Hen. 8,
c. 22.

By 25 Hen. 8, c. 22 (which Dr. Gibson says is repealed by 28 Hen. 8, c. 7, s. 3, and by 1 Mar. sess. 2, c. 1, and which is treated as repealed in "The Statutes Revised"), it was enacted as follows: sects. 3, 4, "Since many inconveniences have fallen . . . by reason of marrying within the degrees of marriage prohibited by God's laws, that is to say, the son to marry the mother or the stepmother, the brother the sister, the father the son's daughter or his daughter's daughter, or the son to marry the daughter of his father procreate and born by his stepmother, or the son to marry his aunt being his father's or mother's sister, or to marry his uncle's wife, or the father to marry his son's wife, or the brother to marry his brother's wife, or any man to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister; which marriages, although they be plainly prohibited and detested by the laws of God, yet nevertheless at some time they have proceeded under colours of dispensations by man's power . . . no person . . . shall from henceforth marry within the said degrees above rehearsed."

Sect. 14. "Provided always, that the article . . . concerning prohibitions of marriages within the degrees aforementioned . . . shall always be taken, interpreted and expounded of such marriages where marriages were solemnized and carnal knowledge was had."

28 Hen. 8,
c. 7.

And by 28 Hen. 8, c. 7, s. 9 (which is not in Mr Hawkins' nor in Mr. Cay's collection, and which Dr. Gibson thinks to be repealed, and which was holden to be so in the case of *Wing v. Taylor* (*f*); but which Vaughan and Ventris, in the case of *Harrison v. Burwell* hereafter following (*g*), do suppose and argue to be unrepealed, and which is considered to be unrepealed in "The Statutes Revised"), it is in like manner enacted thus: "Since many inconveniences have fallen . . . by reason of the marrying within the degrees of marriage prohibited by God's law, that is to say, the son to marry the mother, or the stepmother carnally known by his father; the brother the sister; the father his son's daughter, or his daughter's daughter; or the son to marry the daughter of his father, procreate and born by his stepmother; or the son to marry his aunt, being his father's or mother's sister; or to marry his uncle's wife carnally known by his uncle; or the father to marry his son's wife carnally known by his son; or the brother to marry his brother's wife carnally known by the brother; or any man married, and carnally knowing his wife, to marry his wife's daughter, or his wife's son's daughter, or his wife's daughter's daughter, or his wife's sister."

Sect. 2. "And further to dilate and declare the meaning of

(*f*) 2 Sw. & Tr. 278; vide infra,
p. 575.

(*g*) Infra, p. 570, n. (*l*); p. 572.

these prohibitions, it is to be understood, that if it chance any man to know carnally any woman, that then all and singular persons being in any degree of consanguinity or affinity (as is above written) to any of the parties so carnally offending, shall be deemed to be within the cases and limits of the said prohibitions of marriage; All which marriages, albeit they be plainly prohibited and detested by the laws of God, yet sometimes have proceeded under colour of dispensations by man's power . . . ;" it is enacted, "that no person . . . shall from henceforth marry within the degrees afore rehearsed."

And by 32 Hen. 8, c. 38 (which was repealed in part by 32 Hen. 8, 2 & 3 Edw. 6, c. 23, and was repealed in the whole by 1 & 2 c. 38. P. & M. c. 8, s. 19, but was again revived in part by 1 Eliz. c. 1, s. 3, and so left as it stood upon 2 & 3 Edw. 6, c. 23, as hereafter follows): "All and every such marriages as . . . shall be contracted between lawful persons as by this act we declare all persons to be lawful, that be not prohibited by God's law to marry, such marriages being contract and solemnized in the face of the Church, and consummate with bodily knowledge, or fruit of children or child being had therein, between the parties so married, shall be . . . deemed . . . lawful, good, just and indissoluble, notwithstanding any precontract . . . not consummate with bodily knowledge, which either of the parties so married or both shall have made with any other person or persons before the time of contracting that marriage which is solemnized and consummate, or whereof such fruit is ensued or may ensue as afore; and notwithstanding any dispensation prescription law or other thing granted or confirmed by act or otherwise; And that no reservation or prohibition, God's law except, shall trouble or impeach any marriage without the Levitical degrees; and that no person . . . shall . . . be admitted in any of the spiritual courts . . . to any process, plea or allegation to the contrary."

And by 2 & 3 Edw. 6, c. 23, s. 1, before mentioned, it is 2 & 3 Edw. 6, c. 23. thus enacted: "As concerning precontracts, the said statute of 32 Hen. 8, c. 38, shall cease, be repealed, and of no force or effect, and be reduced to the state and order of the king's ecclesiastical laws of this realm which immediately before the making of the said statute in this case were used in this realm; so that when any cause or contract of marriage is pretended to have been made, it shall be lawful to the king's ecclesiastical judge of that place to hear and examine the said cause, and having the said contract sufficiently and lawfully proved before him to give sentence for matrimony, commanding solemnization, cohabitation, consummation, and tractation as becometh man and wife to have; with inflicting all such pains upon the disobedients and disturbers thereof" as before the said statute he might have done.

Sect. 3. "Provided also that this act do not extend to make good any of the other causes, to the dissolution or disannulling

of matrimony which be in the said act spoken of and disannulled but that in all other causes and other things therein mentioned the said former act . . . do stand and remain in his full strength and power."

Lord Coke.

The degrees specified in these statutes are particularly set forth in the eighteenth chapter of Leviticus, whereby not only degrees of kindred and consanguinity, but degrees of affinity and alliance, do hinder matrimony. Which, following what is expressed by Lord Coke (*h*), may be illustrated in this manner:—

Prohibited
degrees.

Lord Coke.

Of the Man's part.

Degrees of Kindred and Consanguinity prohibited.

A MAN may not marry his
Mother.
Father's sister.
Mother's sister.
Sister.
Daughter.
Daughter of his son or daughter.

Degree of Affinity or Alliance prohibited.

A MAN may not marry his
Father's wife.
Uncle's wife.
Father's wife's daughter.
Brother's wife.
Wife's sister.
Son's wife or his wife's daughter.
Daughter of his wife's son or daughter.

Of the Woman's part.

Degrees of Kindred and Consanguinity prohibited.

A WOMAN may not marry her
Father.
Father's brother.
Mother's brother.
Brother.
Son.
Son of her son or daughter.

Degree of Affinity or Alliance prohibited.

A WOMAN may not marry her
Mother's husband.
Aunt's husband.
Sister's husband.
Husband's brother.
Daughter's husband.
Son of her husband's son or daughter.

Table of
1563.

And according hereunto a table was set forth, in the year 1563, as follows:—

An admonition to all such as shall intend hereafter to enter the state of matrimony godly and agreeable to the laws.

First. That they contract not with such persons as be hereafter expressed, nor with any of like degree, against the law of God, and the laws of the realm.

Secondly. That they make no secret contracts, without consent and counsel of their parents or elders, under whose authority they be, contrary to God's laws, and man's ordinances.

Thirdly. That they contract not anew with any other, upon divorce and separation made by the judge for a time, the laws yet standing to the contrary.

A Man may not marry his

Secundus gradus in lineâ rectâ
ascendente,

Cons. Avia.

Affin. Avi relicta.

Affin. Prosocrus, vel socrus magna.

1. Grandmother.
2. Grandfather's wife.
3. Wife's grandmother.

Secundus gradus inæqualis in
lineâ transversali ascendente,

Cons. Amita.

Cons. Matertera.

Affin. Patru relicta.

Affin. Avunculi relicta.

Affin. Amita uxoris.

Affin. Matertera uxoris.

4. Father's sister.
5. Mother's sister.
6. Father's brother's wife.
7. Mother's brother's wife.
8. Wife's father's sister.
9. Wife's mother's sister.

Primus gradus in lineâ rectâ
ascendente,

Cons. Mater.

Affin. Noverca.

Affin. Socrus.

10. Mother.
11. Stepmother.
12. Wife's mother.

Primus gradus in lineâ rectâ
descendente,

Cons. Filia.

Affin. Privigna.

Affin. Nurus.

13. Daughter.
14. Wife's daughter.
15. Son's wife.

Primus gradus æqualis in lineâ
transversali,

Cons. Soror.

Affin. Soror uxoris.

Affin. Fratris relicta.

16. Sister.
17. Wife's sister.
18. Brother's wife.

Secundus gradus in lineâ rectâ
descendente.

Cons. Neptis ex filio.

Cons. Neptis ex filiâ.

Affin. Pronurus, i. relicta nepotis ex filio.

Affin. Pronurus, i. relicta nepotis ex filiâ.

Affin. Privigni filia.

Affin. Privignæ filia.

19. Son's daughter.
20. Daughter's daughter.
21. Son's son's wife.
22. Daughter's son's wife.
23. Wife's son's daughter.
24. Wife's daughter's daughter.

Secundus gradus inæqualis in
lineâ transversali descen-
dente.

Cons. Neptis ex fratre.

Cons. Neptis ex sorore.

Affin. Nepotis ex fratre relicta.

Affin. Nepotis ex sorore relicta.

Affin. Neptis uxoris ex fratre.

Affin. Neptis uxoris ex sorore.

25. Brother's daughter.
26. Sister's daughter.
27. Brother's son's wife.
28. Sister's son's wife.
29. Wife's brother's daughter.
30. Wife's sister's daughter.

A Woman may not marry with her

Secundus gradus in lineâ rectâ
ascendente,

Cons. Avus.

Affin. Avix relictus.

Affin. Prosocer, vel socer magnus.

1. Grandfather.
2. Grandmother's husband.
3. Husband's grandfather.

Secundus gradus inæqualis in
lineâ transversali ascendente,

Cons. Patruus.

Cons. Avunculus.

Affin. Amite relictus.

Affin. Materterce relictus.

Affin. Patruus mariti.

Affin. Avunculus mariti.

4. Father's brother.

5. Mother's brother.

6. Father's sister's husband.

7. Mother's sister's husband.

8. Husband's father's brother.

9. Husband's mother's brother.

Primus gradus in lineâ rectâ
ascendente,

Cons. Pater.

Affin. Vitricus.

Affin. Socer.

10. Father.

11. Stepfather.

12. Husband's father.

Primus gradus in lineâ rectâ
descendente,

Cons. Filius.

Affin. Privignus.

Affin. Gener.

13. Son.

14. Husband's son.

15. Daughter's husband.

Primus gradus æqualis in lineâ
transversali,

Cons. Frater.

Affin. Levir.

Affin. Sororis relictus.

16. Brother.

17. Husband's brother.

18. Sister's husband.

Secundus gradus in lineâ rectâ
descendente,

Cons. Nepos ex filio.

Cons. Nepos ex filiâ.

Affin. Progener, i. relictus neptis ex filio.

Affin. Progener, i. relictus neptis ex filiâ.

Affin. Privigni filius.

Affin. Privignæ filius.

19. Son's son.

20. Daughter's son.

21. Son's daughter's husband.

22. Daughter's daughter's husband.

23. Husband's son's son.

24. Husband's daughter's son.

Secundus gradus inæqualis in
lineâ transversali descen-
dente,

Cons. Nepos ex fratre.

Cons. Nepos ex sorore.

Affin. Nepotis ex fratre relictus.

Affin. Nepotis ex sorore relictus.

Affin. Leviri filius, i. nepos mariti ex fratre.

Affin. Gloris filius, i. nepos mariti ex sorore.

25. Brother's son.

26. Sister's son.

27. Brother's daughter's husband.

28. Sister's daughter's husband.

29. Husband's brother's son.

30. Husband's sister's son.

1. It is to be noted, that those persons which be in the direct line ascendant and descendant, cannot marry together, although they be never so far asunder in degree.

2. It is to be noted, that consanguinity and affinity (letting and dissolving matrimony) is contracted as well in them and by them which be of kindred by the one side, as in and by them which be of kindred by both sides.

3. Item, that by the laws, consanguinity and affinity (letting and dissolving matrimony) is contracted as well by unlawful company of man or woman, as by lawful marriage.

4. Item, in contracting between persons doubtful, which be not expressed in this table, it is most sure first to consult with

men learned in the laws, to understand what is lawful, what is honest and expedient, before the finishing of their contracts.

5. Item, that no parson, vicar or curate shall solemnize matrimony out of his or their cure, or parish church or chapel, and shall not solemnize the same in private houses, nor lawless or exempt churches, under the pains of the law forbidding the same; and that the curate have their certificates, when the parties dwell in divers parishes.

6. Item, the banns of matrimony ought to be openly pronounced in the church by the minister, three several Sundays or festival days; to the intent that they who will and can allege any impediment, may be heard, and that stay may be made till further trial, if any exception be made there against it, upon sufficient caution.

7. Item, Who shall maliciously object a frivolous impediment against a lawful matrimony to disturb the same, is subject to the pains of the law.

8. Item, Who shall presume to contract in the degrees prohibited (though he do it ignorantly) besides that the fruit of such copulation may be judged unlawful, is also punishable at the ordinary's discretion.

9. Item, if any minister shall conjoin any such, or shall be present at such contracts making, he ought to be suspended from his ministry for three years, and otherwise to be punished according to the laws.

10. Item, it is further ordained, that no parson vicar or curate do preach treat or expound, of his own voluntary invention, any matter of controversy in the Scriptures, if he be under the degree of master of arts, except he be licensed by his ordinary thereunto, but only for the instruction of the people read the homilies already set forth, and such other form of doctrine as shall be hereafter by authority published: and shall not innovate or alter anything in the church, or use any old rite or ceremony which be not set forth by public authority (*i*).

So much concerning the table of degrees, which by reason of the canon here next following it has been thought requisite to insert entire, together with the previous admonitions and the subsequent observations: although some of the said observations (as particularly that concerning the publication of banns on festival days) are now abrogated.

By Can. 99 of 1603, it is ordained as follows:—

“No person shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year of our Lord 1563. And all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so married shall by course of law be separated. And

Canon 99.

(*i*) See Cardwell, Doc. Ann. Vol. I. pp. 316—321.

the aforesaid table shall be in every church publicly set up at the charge of the parish."

Earlier prohibitions.

Before 32 Hen. 8, c. 38, other prohibitions than God's law admits were, Lord Coke says, invented by the court of Rome: the dispensation whereof they always reserved to themselves, as, for instance, in kindred and affinity between cousin germans, and so to the fourth degree; as also, carnal knowledge of any of the same kin or affinity before in such outward degrees. He then adds as follows: "But now by this act, all persons are declared to be lawful to contract matrimony, that be not prohibited by God's law to marry, and that no reservation or prohibition (God's law excepted) shall trouble or impeach any marriage without the Levitical degrees. So as, without question, the son of the father by another wife, and the daughter of the mother by another husband, and *e converso*, may marry" (*k*).

Explanation of rules.

For the better understanding of which prohibitions, together with the grounds and limitations of them, it may not be improper to mention some special rules which have been laid down for that end, both by lawyers and divines. As,

First, that marriages in the ascending and descending line, that is, of children with their father, grandfather, mother, grandmother, and so upwards, are prohibited without limit; because they are the cause (immediate or mediate) of their being; and it is directly repugnant to the order of their nature, which has assigned several duties and offices, essential to each, that would thereby be inverted and overthrown. A parent cannot obey a child, and therefore it is unnatural that a parent should be wife to a child; a parent, as a parent, has a natural right to command and correct a child; and that a child, as husband, should command and correct the same parent, is unnatural. To which we may add, the inconsistency, absurdity and monstrousness of the relations to be begotten, if such prohibition were not absolute and unlimited. The son or daughter, for instance, born of the mother, and begotten by the son, considered as born of the mother, would be a brother or sister to the father; but as begotten by him, would be a son or daughter. So the issue procreate upon the grandmother, as born of the grandmother, will be uncles or aunts to the father; but as begot by the son, they will be sons or daughters to him, and this in the first degrees of kindred (*l*).

(*k*) 2 Inst. p. 683.

(*l*) Gibs. p. 412. See the opinion of the judges delivered by C. J. Vaughan in the case of *Harrison v. Burwell*, 2 Vent. p. 18; Vaugh. p. 224. See also Grotius de J. B. et P. lib. ii. c. 5, with which the Digest agrees: *jure gentium incestum committit, qui ex gradu ascendentium vel descendantium uxorem*

duxerit: Dig. xxiii. 2, 68. And note, that the degrees prohibited by the Levitical law are all within the fourth degree of consanguinity, as established by the computation of the civilians; all collaterals therefore in that degree or beyond it may marry. See Mr. Christian's note to 1 Black. Com. p. 435.

Further, there are several degrees which, although not expressly named in the Levitical law, are yet prohibited by that and by 32 Hen. 8, c. 38, by parity of reason; which is thus illustrated in the *Reformatio Legum Ecclesiasticarum* (*m*). This in the Levitical degrees is to be observed, that all the degrees by name are not expressly set down; for the Holy Ghost there did only declare plainly and clearly such degrees from whence the rest might evidently be deduced. As, for example, where it is prohibited that the son shall not marry his mother, it followeth also that the daughter shall not marry her father. And by injoining that a woman shall not marry her father's brother, the like reason requireth that she shall not marry her mother's brother. To which the same book adds two particular rules for our direction in this matter: 1, That the degrees which are laid down as to men will hold equally as to women in the same proximity; 2, That the husband and wife are but one flesh; so that he who is related to the one by consanguinity is related to the other by affinity in the same degree (*n*).

Upon the foregoing rule from parity of reason (which is also acknowledged and laid down by the books of common law) rests the prohibition against marrying a wife's sister (*o*); which is well expressed by Bishop Jewel in his printed letter upon that point. "Albeit" (says he) "I be not forbidden by plain words to marry my wife's sister, yet am I forbidden so to do by other words, which by exposition are plain enough. For when God commandeth me I shall not marry my brother's wife, it follows directly by the same that he forbids me to marry my wife's sister. For between one man and two sisters, and one woman and two brothers, is like analogy or proportion" (*p*). And when this point of marrying the wife's sister came under consideration in the Court of King's Bench, in 25 Car. 2, in *Hill v. Good*, though it was alleged that the precept *primâ facie* seemed to be only against having two sisters at the same time, and prohibition to the spiritual court was granted; yet in the Trinity term next following, after hearing civilians, they granted a consultation, as in a matter within the statute 32 Hen. 8, though the former statute 28 Hen. 8 had never been revived, which yet it virtually was; and there, as in the statute 25 Hen. 8, the wife's sister is expressly prohibited (*q*).

Upon the like parity of reason, in *Wortly v. Watkinson* (*r*), a consultation was granted, where one had married the daughter of the sister of his former wife; which (as Sir John King laid the argument) is the same degree of proximity as the nephew's marrying his father's brother's wife; and this being expressly prohibited, the other, by parity of reason, is so likewise; as it

(*m*) Fo. 23 a.

(*n*) Gibs. p. 412.

(*o*) 2 Inst. p. 683.

(*p*) Bp. Jewel's Works, Vol. IV. p. 1244.

(*q*) Gibs. p. 412; Vaugh. p. 302; nomine *Hill v. Cook*, 3 Keb. p. 166.

(*r*) 2 Lev. p. 254; 3 Keb. p. 660; T. Jones, p. 118; nomine *Wortley v. Watkinson*, 2 Show. 70.

had been declared in 16 Jac. 1, in *Remington's case* (s), before the high commissioners; which point was again argued in 1 Ann. in the case of *Snowling v. Nursey* (t), and consultation granted as before, notwithstanding the case of *Richard Parsons*, mentioned by Lord Coke, 1 Inst. 235, in which it was first determined not to be within the Levitical degrees, and prohibition granted; but a consultation being awarded on debate two years after, that case is said to have been expunged out of the first Institute by order of the king and council. And this was the very point in which (presently after the making of the act) Lord Cromwell desired a dispensation for one *Massey*, who was contracted to his sister's daughter of his late wife; but the archbishop denied it as contrary to the law of God, and gave for reason that as several persons are prohibited which are not expressed, but understood by like prohibition in equal degree, so in this case it being expressed that the nephew shall not marry his uncle's wife, it is implied that the niece shall not be married to the aunt's husband (u).

Much less can it be doubted whether the like rule concerning parity of reason, does not forbid the uncle to marry his niece (x), which, though not expressly forbidden, is virtually prohibited in the precept that forbids the nephew to marry the aunt; nor is it of moment to allege that the first is a more favourable case, as the natural superiority is preserved; since the parity of degree, which is the proper rule of judging, is the very same (y).

But where, in *Harrison v. Burwell*, in 20 Car. 2 (z), in the spiritual court, one had married the wife of his great uncle, this was declared not to be within the Levitical degrees; and, accordingly, after the opinion of all the judges taken by the king's special command, a prohibition was granted (a).

But such a marriage would be prohibited in countries governed by the civil law. The doctrine is very clearly laid down by Monsieur Du Caurroy, in his explanation of the tenth title of the first book of the Institutes:—"Après nos frères et sœurs, viennent leur descendants. Nous ne pouvons en épouser aucun à l'infini; en effet, notre texte, qui s'occupe ici de l'oncle par rapport aux nièces, petites nièces, &c., declare que quand on ne peut pas épouser la fille d'une personne, on ne peut pas plus en épouser la petite fille (cujus enim filiam, &c.), parce que entre collatéraux celui qui se trouve au premier degré de l'auteur se confond avec ce dernier et est lui-même considéré comme un ascendant pour tous les petits-enfants ou autres descendants de son propre père; il ne peut donc épouser aucune des personnes com-

(s) Cited in *Howard v. Bartlet*, Hob. p. 181.

(t) 2 Lutw. p. 1075.

(u) Gibs. pp. 412, 413.

(x) *Butler v. Castrill*, Gilb. R. p. 158.

(y) Gibs. p. 413.

(z) Vaugh. p. 206; 2 Vent. p. 9; 1 Black. Com. p. 207, Mr. Christian's note.

(a) Gibs. p. 413.

prises dans cette descendance, '*quia parentum loco habetur*,' &c. ; la prohibition qui défend d'épouser son oncle ou sa tante s'étend aux grands oncles et aux grandes tantes jusqu'à l'infini. Etant au premier degré de la souche commune, ils ne peuvent épouser aucun descendant de leurs frères ou sœurs," &c. (b).

By the civil law, first cousins are allowed to marry, but by the canon law both first and second cousins are prohibited. Therefore when it is vulgarly said that first cousins may marry, but second cousins cannot, probably this arose by confounding these two laws; for first cousins may marry by the civil law, and second cousins cannot by the canon law (d).

But now by 32 Hen. 8, c. 38, it is clear that both first and second cousins may marry.

The kindred of the husband are not of affinity to the kindred of the wife; and therefore the husband's brother may marry the wife's sister, as well as the husband's son by a former wife may marry the wife's daughter by a former husband. The affinity is terminated in the husband himself from the wife's kindred, and in the wife herself from the husband's kindred (e).

On this point a very learned civilian gave the following opinion:—

"Can a man legally contract marriage with the widow of the brother of his own deceased wife?"

"I am of opinion that a man may lawfully marry his wife's brother's widow, the rule, as I conceive, being that although affinity will bar marriage, yet affinity which is only engrafted on affinity, as in this case, will not.—M. SWABEY, Doctor's Commons, Feb. 7, 1815."

The son of a father by another wife, and the daughter of a mother by another husband, and so *è converso*, may marry (f).

In the case of *Hains v. Jeffell* (g) in 7 Will. 3, a day was appointed to hear counsel why a prohibition should not be granted to the spiritual court of Worcester, to stay a suit against Hains for marrying with the bastard daughter of his sister. And it was argued for the prohibition, that this is not prohibited by any law, for there is neither affinity nor consanguinity, for a bastard is *nullius filius*. On the contrary, it

Cousins.

Limitations
as to affinity.Consan-
guinity
through
illegitimate
alliances.

(b) Institutes de Justinien nouvellement expliqués, t. i. 121, 123. Cf. Heineccius, El. Jur. Civ. l. 1, t. 10 (de Nuptiis), ss. 152—159: Voet Joh. Commentarius ad Pandectas (de Nuptiis), l. 22, t. 2, s. 29; Montesquieu, l. 26, c. 14; 35 qu. 5; Grotius de J. B. & P. l. 2, c. 5, with the excellent commentary of Barbeyrac; the Reformatio Legum Ecclesiasticarum, tit. 22, c. 1, and Paley, Principles of Moral and Political Philosophy, b. 3, pt. 3, c. 5, for a fuller

discussion of the impediments to marriage by consanguinity and affinity, according to the law of nature, of scripture, of ancient and modern Rome, and of England.

(d) Wood, bk. i. ch. 2, pp. 118, 119; Ayl. Par. p. 364.

(e) Wood, bk. i. ch. 2, p. 119.

(f) Wood, p. 58, and Mr. Toker's MSS. p. 496.

(g) 1 Ld. Raym. p. 68; 5 Mod. p. 168; Gibs. p. 413; *Horner v. Horner*, 1 Consist. p. 353; *The Queen v. Chasin*, 3 Salk. p. 66.

was argued that the Levitical law is *ad proximum sanguinis non accedat*; that the Jews made no difference as to marriage between bastards and others; that though bastards are deprived of certain privileges by particular laws, yet the same reason prohibits them from marriage as others; and by this rule a man might marry his own bastard, which doubtless could not be allowed. And the court inclined not to grant a prohibition; but the cause was adjourned, and it appears not what became of it.

In the case of *Ellerton v. Gastrell* (*h*), where Ellerton had married the daughter of the sister of his former wife, this was declared to be within the prohibition of the Levitical degrees (*i*).

In *Horner v. Horner* (*k*), Lord Stowell says, "According to the general policy of the law in matters merely moral, a person is said to be restrained from marriage with illegitimate relations as much as with legitimate ones, because the rules of prohibition of marriage arise out of natural relations:" and again, "But taking it to be sufficiently settled, as I conceive it is, that moral restraints do attach upon natural consanguinity." He observes, however, that the question does not appear to have received a final decision: as in the case of *Hains v. Jeffell*, the cause was adjourned, although undoubtedly the Ecclesiastical Court, the proper forum on such questions, conceived that that marriage came within the reach of the prohibition.

Dr. Wynne and Sir W. Grant gave opinions in favour of the prohibition (*l*).

"May A., who is the half-brother of B. (that is to say, they are both sons of the same father by different wives), lawfully marry B.'s natural daughter? It may be proper to add that B., after the birth of his said daughter, married the mother. And if you should be of opinion there is no legal objection to such marriage, you are requested to give your opinion whether the parties intermarrying will be liable to any and what censure from the Ecclesiastical Court."

Answer:

"I apprehend that by the ecclesiastical law (by which all questions relating to marriage are to be tried), a man cannot marry his niece, whether such niece be the legitimate or natural daughter of his brother or sister.

"The Ecclesiastical Court would, I conceive, pronounce such marriage to be void, and would inflict whatever censure it might think fit on the parties offending.—W. GRANT, Lincoln's Inn, 5 Feb. 1800."

Upon consideration I agree with the opinion at which Dr. Lingard has arrived in his history (*m*), that the only ground on

Prior illegitimate alliance with kindred.

(*h*) Com. p. 318.

(*i*) Gibs. p. 412.

(*k*) 1 Consist. pp. 352, 353.

(*l*) Mr. Toker's MSS. p. 254.

(*m*) History of England, vol. v. p. 74, and Note C, p. 540 (ed. 1849).

which the marriage of Henry VIII. with Anne Boleyn was pronounced void must have been that of the king's previous criminal intercourse with her sister Mary Boleyn.

But it has been holden by the full court for divorce and matrimonial causes that a marriage is not null because the husband has had a previous criminal connection with the wife's mother (*n*).

On the 31st of August, 1835, was passed the statute intituled, "An Act to render certain Marriages valid, and to alter the Law with respect to certain voidable Marriages." It recites that "marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable;" and enacts that "all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity shall not hereafter be annulled for that cause by any sentence of the ecclesiastical court, unless pronounced in a suit which shall be depending at the time of the passing of this act: Provided that nothing hereinbefore enacted shall affect marriages between persons being within the prohibited degrees of consanguinity."

5 & 6 Will. 4,
c. 54.

Voidable
marriages.

Former
marriages
of persons
within the
prohibited
degrees not to
be annulled.

Sect. 2. "All marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever."

Future
marriages
void.

By sect. 3 this act is not to extend to Scotland.

Consanguinity and affinity, before the passing of this statute, were considered as canonical disabilities, which rendered a marriage voidable and not void; and therefore such marriage could only be annulled by a sentence of nullity during the lifetime of the parties (*o*). But now no sentence of nullity is necessary in all cases of consanguinity and affinity. These are now considered as rendering the marriage *ab initio* void; the parties having been under a legal incapacity to contract a marriage, their union has been meretricious and not matrimonial. This act, which legalizes all marriages within the prohibited degrees of affinity contracted before the 31st of August, 1835, and renders them all void for the future, did not legalize those within the prohibited degrees of consanguinity.

The case of *Ray v. Sherwood* underwent three successive decisions before the Consistory Court of London, the Arches Court,

Ray v.
Sherwood.

(*n*) *Wing v. Taylor*, 2 Sw. & Tr.
p. 278 (1861).

(*o*) *Elliott v. Gurr*, 2 Phillim.
p. 19.

and the Privy Council (*p*), the two latter reversing the judgment of the former. It was a suit brought by the father to annul the marriage of a daughter, who was of age, with the husband of her late sister. The questions raised were chiefly whether the father had such interest as would enable him to bring a civil suit in behalf of a daughter who was of age (*q*); whether the citation, being had before the act passed, constituted a *lis pendens* or not; and what interpretation was to be put upon the act, and how it had affected the jurisdiction of the ecclesiastical courts. It was decided that the service of the citation constituted a *lis pendens*, and that the marriage was void. The following extract from Sir Herbert Jenner's judgment (*r*) relates chiefly to these latter points:—

“These are the contents of the libel and additional articles, and if what is there pleaded can be established by proof, it is quite impossible to say, that this is not a case which calls loudly for the interference of those Courts to whose cognizance such questions properly belong. In the first place, this is a contract which is prohibited by the laws of both God and man—for so, sitting in an Ecclesiastical Court, I should be bound to consider it, even if I were, as I am not, among the number of those who privately entertain any doubt upon the subject. In the second place, it is a secret and clandestine marriage; perhaps not clandestine in the strict legal meaning of the term, for the term ‘clandestine’ is applied by the law to a marriage where there has not been a due publication of banns, and I am not at liberty to enter into that question—but, morally speaking, and using the common acceptation of the term, it is a secret and clandestine marriage, purposely and studiously concealed from the knowledge of those who were directly interested to prevent one of the parties from entering into the unhallowed contract. Lastly, it is a case calling for the interference of the Court; because, as I collect from the libel, there has been no cohabitation of the parties since the marriage, so that it is not too late now for the Court to prevent the consummation of the offence, if the law has not placed an insuperable barrier to any proceeding for that salutary purpose.

“That this Court would and ought to lend its aid and assistance towards the accomplishment of so desirable an object cannot be doubted; and I have myself no hesitation in saying that I should feel great regret if I were to find myself placed in such a situation as to be obliged to reject this libel, and thereby in effect to pronounce that the validity of this marriage could not be questioned. What would be the condition of the parties and of the Court if such should be its present decision? Mr. Sherwood would have a right to claim the *consortium* of his wife; and if she refused to cohabit with him he would be entitled to

(*p*) 1 Moo. P. C. C. p. 353.

(*q*) See *Faremouth v. Watson*, 1

Phillim. p. 355.

(*r*) 1 Curt. p. 197.

institute a suit in these Courts, not for the purpose of compelling her to return to cohabitation in his house (for into it she has never entered as his wife), but to afford him the *consortium vite*, which she has withheld from him by his own consent from the date of the marriage to the present time. The Court would thus be accessory to the commission of that offence, of which there is every reason to believe she is at the present moment innocent. And when the Court has issued its *fiat* to compel her to cohabit with her husband, it may the next day, in another branch of its jurisdiction, be called upon to punish her for the very crime, to the commission of which the Court itself has been an instrument; for, looking at the words of the act of parliament, I am by no means prepared to say that, in prohibiting the Ecclesiastical Courts from annulling marriages of this kind, subsisting at the time of the passing of the act, the legislature has altered the law in any other respect.

"I am not prepared to say that the parties may not be punished by the Ecclesiastical Law for the incest, though the validity of the marriage cannot be called in question."

Parties to incestuous marriage punishable in the Ecclesiastical Court.

After giving much consideration to this point, the learned judge continues: "I do not think, where the enacting part of the statute is to the effect 'that all marriages which shall have been celebrated before the passing of this act between persons being within the prohibited degrees of affinity, shall not hereafter be annulled for that cause by any sentence of the Ecclesiastical Court,' that this amounts to a prohibition to the Ecclesiastical Court to punish the parties under another branch of the law for incestuous cohabitation. I apprehend the law is not altered in this respect, and that the court is not prohibited by this act from punishing parties for such cohabitation, although it cannot declare the marriage null and void.

"Again, if we look to the preamble of the act, it is not for the protection of the parties who have been guilty of the offence, for such it is by the Ecclesiastical Law and by the law of God, but for the protection of the children, for that is the purpose and object of the act, to settle the state and condition of the innocent issue of such marriages, not to screen the delinquent parties. But whatever may have been the intention of the legislature, and whatever may be the effect of this act of parliament, the marriage had between the two parties, Thomas Moulden Sherwood and Emma Sarah Ray, is an incestuous marriage, and must ever so remain. The law of God cannot be altered by the law of man. The legislature may exempt the parties from punishment; it may legalize, humanly speaking, every prohibited act, and give effect to any contract, however inconsistent with the Divine law, but it cannot change the character of the act itself, which remains as it was, and must always so remain, whatever be the effect of the act of parliament. . . ."

Any person may promote a criminal suit for incest in a cause of office, all people having an interest in putting an end to that

Who may institute suit

for incest;
effect where
proved.

which is a public scandal; and if in the course of the evidence, a marriage appears or is proved, though all the proceedings are *in penam*, the Court will pronounce the marriage null and void in the first instance, and then sentence the parties to penance (*s*).



SECT. 4.—*Conditions Precedent—Restrictions as to Descendants of George II.*

In 1717, upon a question referred to all the judges by King George I., it was resolved by the opinion of ten against the other two, that the education and care of all the king's grandchildren, while minors, did belong of right to his majesty as king of this realm, even during their father's life. But they all agreed that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges afterwards concurred in opinion, that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend they did not find precisely determined. The most frequent instances of the crown's interposition go no farther than nephews and nieces; but examples are not wanting of its reaching to more distant collaterals. And the supposed statute of 6 Hen. 6, which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it (*t*): "because the disparagement of the queen shall give greater comfort and example to other ladies of estate, who are of the blood royal, more lightly to disparage themselves." Therefore by 28 Hen. 8, c. 18 (repealed, among other statutes of treasons, by 1 Edw. 6, c. 12), it was made high treason for any man to contract marriage with the king's children or reputed children, his sisters or aunts *ex parte paternâ*, or the children of his brethren or sisters; being exactly the same degrees to which precedence is allowed by the statute 31 Hen. 8, c. 10 (*u*).

Royal Mar-
riage Act.
12 Geo. 3,
c. 11.

In the twelfth year of George III. (1772) the Royal Marriage Act was passed. This celebrated act owed its origin to the displeasure which the marriage of the Duke of Cumberland with Mrs. Horton (*x*), and of the Duke of Gloucester with the Countess Dowager of Waldegrave (*y*), excited in the breast of

(*s*) *Burgess v. Burgess*, 1 Consist. p. 384; *Blackmore v. Brider*, 2 Phillim. 359; *Chick v. Ramsdale and Chick*, 1 Curt. p. 34; vide *infra*, Part IV. Ch. I.

(*t*) The occasion of this statute was the marriage of Catherine, mother to Hen. VI., with Owen Tudor, a private gentleman. See 1 Black. Com. p. 224.

(*u*) See 1 Black. Com. p. 225, and the authorities there cited.

(*x*) A widow lady, daughter to Lord Irnham. This marriage took place in 1772. See Letters of Horace Walpole, vol. 5, pp. 347, 348.

(*y*) Natural daughter of Sir Edward Walpole, brother to Sir Robert. For accounts of her beauty, first

their royal brother, George III. (z). It is intituled "An Act for the better Regulating the Future Marriages of the Royal Family," and is as follows:

"Most gracious Sovereign,

"Whereas your majesty, from your paternal affection to your own family, and from your royal concern for the future welfare of your people, and the honour and dignity of your crown, was graciously pleased to recommend to your parliament to take into their serious consideration, whether it might not be wise and expedient to supply the defect of the laws now in being; and by some new provision more effectually to guard the descendants of his late Majesty King George the Second (other than the issue of princesses who have married, or may hereafter marry into foreign families), from marrying without the approbation of your Majesty, your heirs, or successors, first had and obtained, we have taken this weighty matter into our serious consideration; And, being sensible that marriages in the royal family are of the highest importance to the state, and that therefore the kings of this realm have ever been entrusted with the care and approbation thereof, and being thoroughly convinced of the wisdom and expediency of what your Majesty has thought fit to recommend upon this occasion; we, your majesty's most dutiful and loyal subjects, the lords spiritual and temporal, and commons, in this present Parliament assembled, do humbly beseech your Majesty that it may be enacted, and be it enacted . . . that no descendant of the body of his late Majesty King George the Second, male or female (other than the issue of princesses who have married or may hereafter marry into foreign families), shall be capable of contracting matrimony without the previous consent of his Majesty, his heirs or successors, signified under the great seal, and declared in council (which consent, to preserve the memory thereof, is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council); and that every marriage or matrimonial contract of any such descendant, without such consent first had and obtained, shall be null and void to all intents and purposes whatsoever."

Sect. 2. "Provided always, that in case any such descendant of the body of his late Majesty King George the Second, being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the King, his heirs or successors; that then such descendant, upon giving notice to the King's Privy Council,

Preamble.

No descendant of his late majesty, Geo. 2 (other than the issue of princesses married, or who may marry into foreign families), shall be capable of contracting matrimony without the previous consent of his majesty, his heirs, &c., signified under the great seal, declared in council. Such consent to be entered in the Privy Council books. Every marriage of any such descendant without such consent, shall be null and void.

In case any descendant of Geo. 2, being above twenty-five years old, shall persist to contract a marriage disapproved of by his majesty, such descendant,

marriage, grief at her husband's death, &c., see Letters of Horace Walpole, vol. 3, pp. 170, 218; vol. 4, pp. 61, 63.

(z) The 15th volume of the Annual Register (pp. 91*—94*), from

which this extract is taken, contains a fair summary of the arguments and opinions for and against the act. See also a pamphlet by Mr. Dillon on the Royal Marriage Act.

after giving twelve months' notice to the privy council, may contract such marriage; and the same may be duly solemnized, without the previous consent of his majesty, and shall be good, except both houses of parliament shall declare their disapprobation thereto.

Persons who shall wilfully solemnize, or assist at the celebration of such marriage, without such consent, shall on conviction incur the penalties provided by the Statute of Premunire.

Marriage of the Duke of Sussex.

which notice is hereby directed to be entered in the books thereof, may, at any time from the expiration of twelve calendar months after such notice given to the Privy Council as aforesaid, contract such marriage, and his or her marriage with the person before proposed and rejected may be duly solemnized, without the previous consent of his Majesty, his heirs or successors, and such marriage shall be good, as if this act had never been made, unless both Houses of Parliament shall, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage."

Sect. 3. "That every person who shall knowingly or wilfully presume to solemnize, or to assist, or to be present at the celebration of any marriage with any such descendant, or at his or her making any matrimonial contract, without such consent as aforesaid first had and obtained, except in the case above mentioned, shall, being duly convicted thereof, incur and suffer the pains and penalties ordained and provided by the Statute of Provision and Premunire made in the sixteenth year of the reign of Richard the Second (a)."

An attempt was made to evade the provisions of this act by His Royal Highness the Duke of Sussex, one of the children of George III. His Royal Highness contracted a marriage with the Lady Augusta Murray, daughter of the Earl of Dunmore, first at Rome and afterwards in England, which before the passing of this statute would have been unquestionably valid. George III. caused a suit to be instituted in the proper ecclesiastical court for the purpose of obtaining a sentence declaratory of the nullity of this marriage, which was accordingly obtained (b).

The matter was raised again on the claim of the son of the marriage to succeed his father in the peerage; when the House of Lords resolved that the marriage was void, and the claimant not entitled to succeed (c).

The Regency Act (3 & 4 Vict. c. 52), now repealed with savings, had provisions against a future king or queen marrying under the age of 18 without the consent of the regent and the assent of parliament.

3 & 4 Vict.
c. 52.

SECT. 5.—*Marriage by Banns—Publication.*

Banns, what.

Banns is a Saxon word, and signifies a proclamation.

In *Felloves v. Stewart* (d), Sir J. Nicholl said, "The intention of the publication of banns is to make known that a marriage is about to take place between the individual parties;—if, therefore,

(a) 16 Ric. 2, c. 5.

(b) *Heseltine v. Murray*, 2 Add.
p. 400.

(c) *Sussex Peerage case*, 11 Cl. &
Fin. p. 85.

(d) 2 Phillim. p. 240.

the publication is such as not to designate, but to conceal, the parties—it is no publication.”

It has always been the mind of the church that public notice should be given of the intention of its members to enter into the marriage contract.

By an old constitution of the English Church it was ordered that “Whilst the marriage is contracting, the ministers shall inquire of the people by three public banns, concerning the freedom of the parties from all lawful impediments.” And if any minister shall do otherwise, he shall be suspended for three years (e). Old constitution.

By the rubric it is provided that “The curate shall say after the accustomed manner: Rubric.

“I publish the banns of marriage between M. of — and N. of —. If any of you know cause or just impediment why these two persons should not be joined together in holy matrimony, ye are to declare it. This is the first [second or third] time of asking.”

And the rubric directs that where the parties dwell in divers parishes, the curate of the one parish shall not marry them without a certificate that the banns have been thrice asked from the curate in the other parish.

The statute now in force, 4 Geo. 4, c. 76, entitled “An Act for amending the Laws respecting the Solemnization of Marriages in England,” enacts as follows:— 4 Geo. 4, c. 76.

Sect. 2. “All banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel, in which chapel banns of matrimony may now or may hereafter be lawfully published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell, according to the form of words prescribed by the rubric prefixed to the office of matrimony in the book of common prayer, upon three Sundays preceding the solemnization of marriage, during the time of morning service, or of evening service (if there shall be no morning service in such church or chapel upon the Sunday upon which such banns shall be so published), immediately after the second lesson; and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church or in any such chapel as aforesaid belonging to such parish or chapelry wherein each of the said persons shall dwell; and all other the rules prescribed by the said rubric concerning the publication of banns and the solemnization of matrimony, and not hereby altered, shall be duly observed; and in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns shall have been published, and in no other place whatsoever.”

Banns, where, when and how published, and marriage to be solemnized where banns published.

It is to be observed, that the words at the close of the prayer in the marriage service,—“Therefore if any man can show any Notice in marriage service.

just cause why they may not lawfully be joined together, let him now speak or else hereafter for ever hold his peace,"—amount to a fourth publication of banns.

Republication
of banns.

Republication
of banns
necessary if
marriage not
solemnized
within three
months.

With respect to the time which may elapse between the complete publication and the solemnization of marriage, sect. 9 of 4 Geo. 4, c. 76, enacts that, "Whenever a marriage shall not be had within three months after the complete publication of banns, no minister shall proceed to the solemnization of the same until the banns shall have been republished on three several Sundays in the form and manner prescribed in this act, unless by licence duly obtained according to the provisions of this act."

The following judgments by Lord Stowell—though given while Lord Hardwicke's Act (26 Geo. 2, c. 33) was in force—contain valuable expositions of the general principles of law applicable to banns.

Object and
principles of
publication of
banns.

In *Wakefield v. Wakefield*, he says, "The marriage, except in case of a licence, is to be performed by proclamation of banns, which is to designate the individual, in order to awaken the vigilance of parents and guardians, and to give them an opportunity of protecting their rights. It therefore requires that a true name should be given to them, evidently considering that a name assumed for the occasion is a name that will not answer the purposes of the provisions.—Accordingly, the Court has conceived itself to be carrying the intention of the law into effect where it has annulled marriages where a false name has been inserted in the banns, though no fraud were intended; upon the ground that such proclamation was no proclamation referring to that marriage, but to another transaction; the marriage therefore was without proclamation of banns, and consequently illegal. There was a fraud, a want of fidelity and truth in the application of the banns to the marriage, though there might be no fraud in the original intention. It is therefore clear that if there is a true name, that true name must be used; it may be a name less notorious to the world than some name which the party has thought fit to assume, but is not less the true name on that account; it is the name which it is presumed her relations, her parents, and her guardians are the best acquainted with, and therefore the name which ought to be applied upon such an occasion, provided she is possessed of such a name" (*f*).

In *Sullivan v. Sullivan*, he observes, "It is sufficient for me to state the following positions as composing clear and settled parts of the matrimonial law of this country,—built as that law is on two foundations,—the ancient canon law and modern statutes:—That banns or proclamation of intended marriage must be thrice published in the church or churches of the parish or parishes where the parties dwell, and in one of which the marriage is to be celebrated: That these banns, being notifications of the intended marriage, must indicate the parties by the description of their names and parish residence; That the law

(*f*) 1 Consist. p. 401. See also *Cope v. Burt*, 1 Consist. p. 438.

derived, as I have described, from two sources, does in terms or in effect require those two particulars, but under different sanctions. A false description of residence is, by a particular clause of the modern Marriage Act, rendered a mere *impedimentum impeditivum*,—imposing on the clergyman, if the fact be known to him, the duty of not proceeding with the marriage, but not invalidating the ceremony if once performed. The publication of false names is different, though no such difference is marked in that statute; it forms an *impedimentum dirimens*, invalidating the marriage *in toto*; and this arising from the very nature of the thing, and the intent and use of the publication” (g).

In the same judgment he observes upon the case of illegitimate children, thus:—

Illegitimate children.

“The Court has had occasion to observe that it may in some cases, be difficult to say what are the true names, particularly in the case of illegitimate children. They have no proper surname but what they acquire by repute; though it is a well-known practice, which obtains in many instances, to give them the surname of their mother, whose children they certainly are, whoever be their father. However, if they are much tossed about in the world in a great variety of obscure fortunes, as such persons frequently are, it may be difficult to say for certain what name they have permanently acquired, as was the case in *Wakefield v. Wakefield*. In general it may be said, that where there is a name of baptism and a native surname, those are the true names, unless they have been overridden by the use of other names assumed, and generally accredited” (h).

In *Pouget v. Tomkins*, he says, “In strictness, I conceive that all parts of a baptismal name should be set forth, as composing altogether the name and legal description of the party In proclamation of banns, it is also highly proper, that they should be enumerated; at the same time I cannot go so far as to say that, in all cases it is absolutely and essentially necessary, and that the publication would, on account of such omission alone, in all cases be invalidated. When there was no fraud intended, nor any deception practised, and where the suppression was only of a dormant name, which had not been generally used, it might be too much to hold that a perfectly honourable marriage should be invalidated by such omission. The case might be put also, that one party had wilfully suppressed a dormant name not known to the other, for the purpose of reserving a plea for invalidating the marriage at a future time. That would be an effect which the law would be unwilling to give to an omission so practised. Where, however, there is fraud intended, and where the omission is not casual, but intentional, and made a principal part of the machinery of the fraud,

All baptismal names in strictness should be set forth.

(g) 2 Consist. p. 253. See also *Wilson v. Brockley*, 1 Phillim. p. 147, as to names of reputation superseding names of baptism.
(h) *Sullivan v. Sullivan*, 2 Consist. p. 253.

I should hold that the Court would be bound to enforce the most literal interpretation, for the purpose of supporting the true spirit of the act" (i).

Variation of the names of parties may be—1. Total; 2. Partial. Their different effects.

In the judgment in *Sullivan v. Sullivan* (j), already referred to, there is the following passage, "variations of the names of parties sometimes occur in banns. If they are total, the rule of law respecting them cannot be doubtful. It never can be contended that such names can be deemed true designations; nor could one have supposed that such names could have been used, but for the purposes of gross fraud, if the case of *Mather* against *Neigh* had not occurred, in which the woman, from a mere idle and romantic frolic, insisted on having her banns put up in the name of *Wright*, to which she had no sort of pretension. Such a pretension, whether fraudulently intended or not, operates as a fraud, and is therefore held to invalidate a marriage (k). But besides total variations, there may be partial variations, of different degrees, from different causes, and with different effects. The Court is certainly not to encourage a dangerous laxity, neither is it to disturb honest marriages by a pedantic strictness. Variations may consist in the alteration of a letter, as it did in *Dobbyn* for *Dobbyn*; in more than one, as *Widdowcroft* for *Meddowcroft*; in the suppression of a name where there are more than two, as *William Pouget* for *William Peter Pouget*; in the addition of a name where there are only two known, as in the present case; and in those of *Heffer v. Heffer*, *Tree v. Quin*, *Dobbyn v. Corneck*. Such varieties may arise not only from fraud, but from negligence, accident, error from unsettled orthography, or other causes consistent with honesty of purpose. They may disguise the name and confound the identity nearly as much as a total variation would do, in which case the variation is for the very same reason fatal, from whatever cause it arises. Where it does not so manifestly deceive, it is open to explanation, if it can be given. If the explanation offered implies fraud, that fraud will decide any doubt concerning the sufficiency of the name to disguise the party. The Court will certainly hold against the party that what he intended to be sufficient to disguise the names shall be so considered at least as against him. He can have no right to complain that too strong an effect is given to his act, when he himself intended it should produce that effect. But if the explanation refers itself to causes perfectly innocent, and if it be supported by credible testimony, overcoming all the objections that may be applied against its truth, the Court will decide for the explanation, and against the sufficiency of the variation to operate as a disguise where no such effect was intended. If the explanation

(i) *Pouget v. Tomkins*, 2 Consist. p. 143; see also *Wyat v. Henry*, 2 Consist. p. 220; *Green v. Dalton*, 1 Add. 289; *Dobbyn v. Corneck*, 2 Phillim. p. 102; *Fellowes v. Stewart*,

Ibid. p. 238.

(j) 2 Consist. p. 253.

(k) See, however, Lord Stowell's decision in *Mayhew v. Mayhew*, 2 Phillim. p. 13.

should leave the matter doubtful, then evidence of general fraud may be let in, to decide what is left undecided on the explanation. But the only falsehood that can be shown, in the first place, is the falsehood, at least the insufficiency, of the explanation itself; for till that falsehood or insufficiency is shown there is no admission for evidence of any matter besides" (l).

The foregoing cases apply solely to such marriages as were contracted under the provisions of 26 Geo. 2, c. 33. That statute governs marriages which were solemnized before the 1st of September, 1822, when it was in part repealed by 3 Geo. 4, c. 75; the duration of the latter act did not exceed one year, when 4 Geo. 4, c. 76, the present Marriage Act, repealed all prior statutes relating to marriage (m). An excellent commentary on the changes introduced by these latter acts into the original Marriage Act of Geo. II., is to be found in the judgment of Sir H. Jenner in *Wright v. Elwood* (n), from which the following extract is taken. The real question before the Court was the validity of a marriage preceded by no publication of banns, but *de facto* solemnized in church.

Changes in
Marriage
Acts.

Wright v.
Elwood.

"Now, it has been maintained," said the learned judge, "that the publication of banns of a woman who is already married and whose husband is alive, is a mere nullity; that it is not properly an undue publication of banns, but it is no publication at all, and that it would be contrary to the policy of the law if the Court were to uphold a marriage not preceded by any publication of banns, nor by a licence; and it has been also stated that such was the case, even before the passing of the first Marriage Act, 26 Geo. 2, c. 33, in 1754. But I confess I do not feel very strongly the force of that argument: for, as far as I can understand the principle upon which marriages are made null and void, on these grounds, under the act, it is that where false names are used intentionally, with a view of deceiving the public, it is no publication at all. So that in the case of the publication of false names, the publication is a mere nullity. In *Pouget v. Tomkins* (o), Lord Stowell said: 'The clear intention of the act is, that the true names of the parties should be published, and if they are not so published, it is no publication: no notice is given, and no opportunity is afforded to any one to allege an impediment. It has been constantly held, therefore, since the case of *Early v. Stevens*,'—which was in 1785, and I believe the earliest case under the Marriage Act,—'that a publication in false names is no publication.' And on no other principle could such a case have been brought under the provisions of that act, where the terms made use of, are, 'without

Marriage
without
publication
of banns.

(l) See also *Wilson v. Brockley*, 1 Phillim. p. 147.

(m) See notes to *Stayte*, otherwise *Farquarson v. Farquarson*, 3 Add. p. 282. See also *Stanhope v.*

Baldwin, 1 Add. p. 94; *King v. Sansom*, 3 Add. p. 277.

(n) 1 Curt. p. 669.

(o) 2 Consist. p. 146.

publication of banns ;' it does not speak of 'undue publication ;' but that statute required that a marriage should be preceded by publication of banns, or by licence. It seems to me, that a marriage was void under that statute only where there had been no publication—undue publication was not sufficient, unless it amounted to the absence of all publication.

Banns before
Marriage
Acts.

"This was the state of the law under the 26 Geo. 2, c. 33. Before that statute, marriages, without publication of banns or any religious ceremony,—contracts *per verba de presenti*,—might be good and valid, though irregular: the parties and the minister might be liable to punishment, but the *vinculum matrimonii* was not affected. After the passing of the act 26 Geo. 2, c. 33, marriages were placed on a different footing as to banns and licences ; a certain degree of regularity was essential to the validity of the marriage contract, and marriages not preceded by banns or licence were null and void. In that act, however, there was no provision for the protection of innocent parties, and many cases are in the recollection of the Court in which it had produced very injurious consequences. Parties even guilty of actual fraud have obtained a separation without the possibility of doing justice to the party not cognizant of the fraud.

"This state of things continued many years, but at length the legislature interfered to prevent the mischievous effects resulting from the provisions of this act, and to soften the rigour of the existing law.

Under
3 Geo. 4, c. 75.

"I pass by the act of 3 Geo. 4, which existed but for a short time, and I proceed to the act 4 Geo. 4, c. 76, which was in force at the time of this marriage, and is the law which is applicable to it.

Under
4 Geo. 4, c. 76.

"This act begins by repealing all the former acts then in force. Part of the act 26 Geo. 2 had been repealed by the act 3 Geo. 4, but still part remained in force, and the remainder of that act, as well as the 3 Geo. 4, was repealed : so that, at that time, if the legislature had done no more, the common law and general law, as it existed before the Marriage Act of 1754, would have been restored, and a marriage would have been good and valid without any publication of banns or licence. But the legislature did not stop here ; it went further, and declared in the 22nd section, that where parties shall intermarry, knowingly and wilfully, without due publication of banns or licence, the marriage shall be null and void. It has not adopted the terms of the former act, declaring that marriages shall not be solemnized 'without publication of banns ;' but the legislature has said : 'If any person shall, knowingly and wilfully, intermarry without due publication of banns, or licence from a person or persons having authority to grant the same, first had and obtained, the marriages of such persons shall be null and void to all intents and purposes whatsoever :' thereby, as I have stated, softening the rigour of the former law under the

26 Geo. 2. And according to the construction put upon this section by the Consistory Court of London (*p*), by this Court, during the time of my predecessor (*q*) as well as in my own time (*r*), by the Court of King's Bench (*s*), and I think I might say by the Judicial Committee of the Privy Council (*t*) (though, perhaps, the point has not received an actual and direct decision of the latter tribunal), where the parties are not both cognizant of the false name, the marriage cannot be declared void. It is necessary that both parties should be accessory to the fraud; the act of one will not operate to the prejudice of the other, unless a participator.

"The question then is, as the act speaks of marriages 'without due publication of banns,' what is the consequence where there is no publication of banns? for according to Lord Stowell, in the case to which I have adverted, the publication of banns, in a false name, is equivalent to no publication. The Court can see no difference between the cases, which stand precisely on the same grounds; nor does there seem a reason why there should be a difference; the fraud is the same in both; the remedy is the same in both.

"It is, however, contended that the words 'without due publication of banns,' used in the statute 4 Geo. 4, c. 76, do not extend to cases of marriage not preceded by any publication of banns, as there are no words in the act to that effect; but if that were so, the former Marriage Act being repealed altogether, upon this repeal, the general law was revived and came into operation, and continues to be in operation, except so far as it is qualified and restrained by the 4 Geo. 4, c. 76, the only act now in operation; and unless this act extends to cases of marriage not preceded by any publication of banns, as distinguished from undue publication, a marriage, where a false name was used, would be a good and valid marriage. But I have no doubt that a marriage, which has not been preceded by any publication of banns at all, is a marriage within the meaning of the terms,—that is, a marriage without due publication of banns. Marriages without due publication of banns are declared null and void, and I should be glad to know how it is possible that that can be a due publication of banns, which is no publication at all, and how it can be contended, with any effect, that marriages, where the publication of banns is a mere nullity, can be distinguished from marriages without a due publication of banns."

No publication now equivalent to an undue publication of banns.

(*p*) *Wiltshire v. Prince*, 3 Hagg. Eccl. p. 332.

(*q*) *Hadley v. Reynolds*, not reported.

(*r*) *Tongue v. Allen*, 1 Curt. p. 38.

(*s*) *The King v. The Inhabitants of Wroxtton*, 4 B. & Ad. 640.

(*t*) *Tongue v. Tongue*, 1 Moo. P. C. C. p. 90; see also *Gompertz v. Kensit*, L. R. 13 Eq. p. 369; 20 W. R. p. 313.

False name. Since the establishment of the Probate and Divorce Court, "a marriage by banns, where by the consent of both parties the name of the man was falsely stated to be 'John,' his baptismal name being 'Bower' only, has been by that Court declared null and void" (x).

False residence. In another case the residence of both parties was wrongly stated by the husband to be in the parish in which he only resided. In so doing he acted "knowingly and wilfully," but the wife had no knowledge of the transaction. The marriage was uphelden (y).

Invalid for bidding. A publication of banns which had been openly objected to, but the objection to which had been found invalid, would be considered as a due publication.

Time of proclaiming banns. As to the time of proclaiming the banns in church the original rubric directed:—

"First the banns of all that are to be married together must be published in the church three several Sundays, or Holydays, in the time of divine service, immediately before the sentences for the offertory, the curate saying after the accustomed manner:" &c., &c. (z).

The rubric as now printed directs—

"First the banns of all that are to be married together must be published in the church three several Sundays, during the time of morning service, or of evening service (if there be no morning service), immediately after the second lesson; the curate saying after the accustomed manner:" &c., &c.

It appears "that about the year 1809 the curators of the press at Oxford (a) caused the rubric to be altered in all the Oxford Prayer Books, so as to make it direct that the banns shall be published after the second lesson at morning, or the second lesson at evening, prayer, their object being to bring the rubric into agreement with 26 Geo. 2, c. 33, s. 1."

In 1856, the case of *Regina v. Benson* was tried at the Oxford Summer Assizes, and the following observations are copied from the shorthand writer's notes (b).

In the examination of the parish clerk of the defendant's parish the following observations occur:—

"Mr. Baron Alderson (to the witness).—I suppose you publish your banns in the morning service?—Yes.

"After the second lesson?—Yes.

"Mr. Baron Alderson.—I believe that strictly they ought to

(x) *Midgeley* (f. c. Wood) v. Wood (1862), 4 Sw. & Tr. 267.

(y) *Templeton v. Tyree*, L. R. 2 P. & D. p. 422.

(z) Blunt, *Annotated Book of Common Prayer*, p. 261.

(a) See the Bishop of Exeter's Speech in Hansard, series iii. vol. viii. p. 22.

(b) Supplied by the solicitor for the prosecution in a letter to the editor of the Times, dated Oxford, Dec. 22, 1866.

be published in the communion service, according to the act of parliament.

"Mr. Keating, Q.C., for the defendant.—Yes, my lord; I believe the witness is mistaken.

"Do you not know that in point of fact Mr. Benson does publish them in the communion service?—Yes; it was a mistake of mine.

"Mr. Baron Alderson.—The banns are required to be published in this way, at the time of morning service, or at evening service, where there is no morning service, immediately after the second lesson. Then it goes on to say that all rules prescribed by the rubric not hereby altered shall be duly observed. Now, the rubric prescribes that the banns of marriage at the morning service shall be at the communion, and the rule prescribed by the rubric is not altered, therefore it should be at the communion."

In the course of a long summing up Mr. Baron Alderson made the following remarks:—

"The rubric had provided that the publication of the banns should be at the most frequented period of the service,—namely, just after a portion of the communion service was read. That was the period of time provided by the rubric, and which the act of parliament seems to me to have continued. But then it was said that there were many churches (and unfortunately in the reign of George II. there were a great many—I hope it is better now—I believe it is a great deal better) in which there was no morning service, and, therefore, people could not be married at all according to the rubric of the Church of England, which always contemplated service twice every day, though, owing to the neglect of some of the clergy or bishops in those days, it sometimes happened that in some churches there was no service for three weeks, and in others only service in the afternoon every other Sunday. The consequence of that would be that in those cases it would be impossible to publish the banns properly, because they were to be published on three successive Sundays. Unless, therefore, there was power to publish them in the afternoon service where there was no morning service they could not be published regularly, and therefore it was provided that the banns might be published during the performance of evening service, and then the rubric, not having fixed the period of the evening service in which the banns were to be published, it was provided that they should be published after the reading of the second lesson, which is about the period of the afternoon service when the church would be the fullest—just after the laggards have arrived, and before anybody has left the church."

There exists, however, a great doubt upon this subject, though it seems that the reasoning of Baron Alderson is well founded.

Bishop Wilberforce expressed the same opinion in the charge which he delivered when Bishop of Oxford in 1866.

Where banns
to be pub-
lished.

The result of various legislative enactments on the subject of the place of publication is, that in whatever place the marriage may be solemnized, there the banns must be published.

The bishop has now authority to order the publication of banns in any duly licensed chapel within his diocese as well as in a parish church; at first he had only power to authorize marriages by licence in chapels.

6 & 7 Will. 4,
c. 85.

Bishop, with
consent of
patrons, may
license chapels
for the solemn-
ization of
marriages in
populous
places.

The legislative enactments on this point are the following:—
6 & 7 Will. 4, c. 85, s. 26. "And whereas it is expedient that provision should be made, under proper restrictions, for relieving the inhabitants of populous districts remote from the parish church, or from any chapel wherein marriages may be lawfully celebrated according to the rites and ceremonies of the Church of England, from the inconvenience to which they may be thereby subjected in the solemnization of their marriages; Be it therefore enacted, that, with the consent under the hand and seal of the patron and incumbent respectively of the church of the parish or district in which may be situated any public chapel with or without a chapelry thereunto annexed, or any chapel duly licensed for the celebration of divine service according to the rites and ceremonies of the Church of England, or any chapel the minister whereof is duly licensed to officiate therein according to the rites and ceremonies of the Church of England, or without such consent after two calendar months' notice in writing given by the registrar of the diocese to such patron and incumbent respectively, the bishop of the diocese may, if he shall think it necessary for the due accommodation and convenience of the inhabitants, authorize by a licence under his hand and seal the solemnization of marriages, in any such chapel for persons residing within a district the limits whereof shall be specified in the bishop's licence, and under such provisions as to the amount, appropriation, or apportionment of the dues, and as to other particulars, as to the said bishop may seem fit, and as may be specified in the said licence; provided that it shall be lawful for any patron or incumbent who shall refuse or withhold consent to the grant of any such licence to deliver to the bishop, under his or her hand and seal, a statement of the reasons for which such consent shall have been so refused or withholden; and no such licence shall be granted by any bishop until he shall have inquired into the matter of such reasons; and every instrument of consent of the patron and incumbent, or, if such consent be refused or withholden, a copy of the notice under the hand of the registrar, and every statement of reasons alleged as aforesaid by the patron or incumbent, with the bishop's adjudication thereupon under his hand and seal, shall be registered in the registry of the diocese; and thenceforth and until the said licence be revoked marriages solemnized in such chapel shall be as valid to all intents and purposes as if

the same had been solemnized in the parish church, or in any chapel where marriages might heretofore have been legally solemnized" (c).

The next statute, 1 Vict. c. 22, enacts as follows:—

Sect. 33. "The banns of marriage of any persons may be published in any chapel licensed by the bishop, according to the provisions of the said act (d) for marriages, for the solemnization of marriages, in which those persons might lawfully be married; and instead of the notice required by the said act, the words 'banns may be published and marriages may be solemnized in this chapel,' shall be placed in some conspicuous part of the interior of every such chapel."

1 Vict. c. 22.

Banns may be published in chapels where marriages may be solemnized.

Sect. 34. "'And whereas doubts may arise whether under the said recited acts it is lawful for the bishop to license chapels for marriages between parties, one only of whom resides within the district specified in such licence; be it therefore enacted and declared, that all such licences shall be construed to extend to and authorize marriages in such chapels between parties, one or both of whom is or are resident within the said district: provided always, that where the parties to any marriage intended to be solemnized after publication of banns shall reside within different ecclesiastical districts, the banns for such marriage shall be published as well in the church or chapel wherein such marriage is intended to be solemnized, as in the chapel licensed under the provisions of the said recited act for the other district within which one of the parties is resident, and if there be no such chapel, then in the church or chapel in which the banns of such last mentioned party might be legally published, if the said recited act had not been passed."

Marriages may be in licensed chapels, though only one of the parties is resident in the district.

Publication of banns where the parties reside in different districts.

To return to the act 6 & 7 Will. 4, c. 85. Sect. 27 deals with the fees arising from marriages under sect. 26; and it is then enacted as follows:—

6 & 7 Will. 4, c. 85.

Sect. 28. "When the said bishop shall authorize the solemnization of marriages in any such chapel as aforesaid, without the consent under the hand and seal of the patron and incumbent respectively, it shall be lawful for them or either of them to appeal within one calendar month to the archbishop of the province, who shall hear the same in a summary manner, and shall make such order confirming, revoking, or varying the licence so given, as to him shall seem meet and expedient, which order shall be registered in the registry of the diocese, and shall be conclusive and binding on all the parties whatsoever."

Patron or incumbent may appeal to the archbishop against such licences.

Sect. 30. "All provisions which shall from time to time be in force relative to marriages, and to providing, keeping, and

Marriages performed in such chapels

(c) The stamp duty on a licence licensing a chapel for the solemnization of marriages therein pursuant to the provisions of this act is fixed

by 54 & 55 Vict. c. 39 (Schedule, tit. Licence), at 10s.

(d) 6 & 7 Will. 4, c. 85, s. 29.

to be under the same regulations as those performed in parish churches.

transmitting register books and copies of registers of marriages solemnized in any parish church, shall extend to any chapel in which the solemnization of marriages shall be authorized as aforesaid, in the same manner as if the same were a parish church, and everything required by law to be done relating thereto by the rector, vicar, curate, or churchwardens respectively of any parish church shall be done by the officiating minister, chapelwarden, or other person exercising analogous duties in such chapel respectively."

Option to parties to be married at parish church.

Sect. 31. "Notwithstanding any such licence as aforesaid to solemnize marriages in any such chapel, the parties may, if they think fit, have their marriage solemnized in the parish church, or in any chapel in which heretofore the marriage of such parties or either of them might have been legally solemnized."

Bishop, with consent of archbishop, may revoke such licences;

Sect. 32. "Any such licence or order may at any time be revoked by writing under the hand and seal of the bishop of the diocese, with the consent in writing of the archbishop of the province; and such revocation and consent shall be registered in the registry of the diocese, the registrar whereof shall notify the same in writing to the minister officiating in the chapel, and shall also give public notice thereof by advertisement in some newspaper circulating within the county and in the London Gazette, and thenceforth the authority to solemnize marriages in such chapel shall cease and determine."

in which case registers to be sent to the incumbent of the parish church.

Sect. 33. "In case of the revocation of the licence to solemnize marriages in any such chapel all registers of marriages solemnized therein under such licence which shall be in the custody or possession of the minister of such chapel at the time of such revocation shall forthwith be transmitted to the incumbent or officiating minister of the parish church, and shall thenceforth be preserved, and in all other respects dealt with in the same manner, and be of the same force and validity, to all intents and purposes, as if they had been originally made and deposited with such incumbent or officiating minister; and such incumbent or minister shall, when he next transmits to the superintendent registrar copies of the registers of marriages solemnized in such parish church, also therewith transmit copies of all such entries as shall have been made in such first-mentioned registers subsequent to the date of the last entry a copy whereof was transmitted to the superintendent registrar, and shall also transmit to him one copy of every register book so transmitted to him of which no copy shall have been already transmitted to the superintendent registrar, having first signed his name at the foot of the last entry therein."

Registrars of dioceses to send to the register office yearly lists of licensed chapels within their districts.

Sect. 34. "The registrar of every diocese shall . . . within fifteen days after the first day of January . . . make out and send through the post office, directed to the registrar-general of births, deaths, and marriages, at his office, a list of all chapels belonging to the Church of England within that diocese wherein

marriages may lawfully be solemnized according to the rites and ceremonies of the Church of England, and shall distinguish in such list which have a parish, chapelry, or other recognized ecclesiastical division annexed to them, and which are chapels licensed by the bishop under this act, and shall state therein the district for which each of such chapels is licensed according to the description thereof in the licence; and the registrar-general shall in every year make out and cause to be printed a list of all such chapels, and also of all places of public worship registered under the provisions of this act, and shall state in such list the county and registrar's district within which each chapel or registered building is situated, and shall add also the names and places of abode of the registrars and deputy registrars of each district, and of the superintendent registrars; and a copy of such list shall be sent to every registrar and superintendent registrar."

List of all chapels and buildings registered to be printed.

And here it may be convenient to direct attention to those portions of the Church Building Acts and New Parishes Acts which authorize the solemnization of marriages, both by banns and licence, in churches and chapels of separate and distinct parishes, of district parishes, of district chapelries, of consolidated chapelries, and of extra-parochial places and of new parishes (e).

Church Building, &c. Acts.

By 58 Geo. 3, c. 45, s. 27, "All acts of parliament, laws, and customs relating to publishing banns of marriage, marriages, christenings, churchings, and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings shall apply to such separate and distinct parishes and district parishes when they shall so become complete, separate and distinct parishes or district parishes, under the provisions of this act, after the death, resignation, or other avoidance of the existing incumbents respectively in each such parish or extra-parochial place, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls, or serving the same, in like manner in every respect as if the same respectively had been ancient, separate, and distinct parishes and parish churches by law, to all intents and purposes."

58 Geo. 3, c. 45.

Marriages in separate parishes, and in district parishes.

Act. 28. "Provided always that no banns of matrimony shall be published, or marriages celebrated or solemnized, baptisms or churchings had by any person whatever within any church or chapel of any such separate and distinct parish so made by any such division as aforesaid, or in any private house therein, or within any such district church or chapel, or in any private house within such district, nor shall any burial be performed within any cemetery appertaining or belonging to any such church or chapel by any person whatever, except by the incumbent of the church of the parish

Proviso as to such marriages.

(e) See part vi. ch. v. p. 294, of Mr. Law's 5th edition of the Church Building Acts; from which these sections are taken.

or extra-parochial place from which such parish shall have been separated, or some curate of such incumbent duly licensed in that behalf, until after the death, resignation, or other avoidance of the spiritual person who shall be the incumbent of the church of the parish or the extra-parochial place at the time of the consecration of any such church or chapel of any such separated parish or district parish; and from and after the death, resignation, or other avoidance of the then incumbent, to be certified under and according to the provisions of this act, banns of matrimony may be published, and marriages celebrated and solemnized, baptisms, christenings, and churchings had within the church or chapel of any such separated parish or district parish, provided the same be respectively published, celebrated, solemnized, and had according to the laws and canons in force within the realm in that behalf; and all such banns as shall be published, and also all and every such marriage and marriages as shall be celebrated and solemnized, in any such church or chapel, after the entries, under and according to the provisions of this act, of the notification, under the hand and seal of the bishop of the diocese, of the death, resignation, or other avoidance of the incumbent of the church of the parish or extra-parochial place, shall be as good, valid, and effectual to all intents and purposes as if the same were published, celebrated, and solemnized in the church of the parish or extra-parochial place in which the same shall be situate."

Time when
the publica-
tion of banns
may com-
mence.

Sect. 29. "The death, resignation, or other avoidance of the spiritual person who was the incumbent of the church of any parish and extra-parochial place in which any such separated parish or district church or chapel shall be so consecrated as aforesaid, at the time of such consecration, shall be notified by the bishop of the diocese, under his hand and seal, to the spiritual person then serving the church or chapel, and to the churchwardens of the parish or place in which the church or chapel shall be situate; and such notification shall be preserved with and copies thereof shall be entered in the books of registers of marriages, births, and burials of the church of the parish or extra-parochial place and copies of such notifications shall be also entered in the books of registers to be provided for entering the publications of banns and solemnization of marriages, and the baptisms and burials in such chapels; and such entries shall be authenticated by the churchwardens of such churches and chapels respectively, and shall be sufficient evidence of the period of commencement under the provisions of this act, of the publication of banns or solemnization of marriages. . . . in any such chapel. . . ."

59 Geo. 3,
c. 134.

By 59 Geo. 3, c. 134, s. 6, marriages may be solemnized in consolidated chapelries formed under that act (*f*).

By sect. 16 the Ecclesiastical Commissioners with the bishop may allow marriages in any chapel.

(*f*) See also 8 & 9 Vict. c. 70, s. 10.

Sect. 17. "All acts of parliament, laws, and customs relating to publishing banns of marriage, marriages, christenings, churchings, and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, shall apply to all districts and consolidated or district chapelries, and divisions of any parishes or extra-parochial places, whereof the boundaries shall be enrolled in the High Court of Chancery under the provisions of the said recited act and this act; and in the churches, and chapels whereof banns of marriage shall be allowed to be published, and marriages, christenings, churchings, and burials, or any of them, shall be allowed to be solemnized, and to the churches and chapels thereof, and to the ecclesiastical persons having cure of souls therein or serving the same, in like manner in every respect as if the same respectively had been ancient, separate, and distinct parishes and parish churches by law to all intents and purposes."

Laws relating to such marriages.

By 3 Geo. 4, c. 72, s. 17, "In every case in which marriages are allowed, under any of the provisions of the above recited acts or either of them, to be solemnized in any chapel of a district chapelry, and in which the parties, or either of them contracting such marriage, shall reside in the district of the chapelry, or in any other district of any chapelry, the banns of marriage shall be published in the chapel or chapels of each of the districts in which such parties respectively reside, and no publication of such banns in any other church or chapel shall be legal, valid, or effectual for the purposes of such marriage; any thing in the above recited acts or either of them, or any other act or acts of parliament, contained to the contrary notwithstanding" (g).

3 Geo. 4, c. 72.
Publication of banns, when parties reside in different districts.

Sect. 18. "All acts of parliament, laws, and customs relating to publishing banns of marriage, and to marriages, christenings, churchings, and burials, and the registering thereof, and to all ecclesiastical fees, oblations, or offerings, shall apply to all extra-parochial places, and to all divisions and districts of any extra-parochial places in and for which any churches or chapels shall be built or appropriated under the provisions of the above recited acts or this act, and to the churches and chapels thereof, and to the ecclesiastical persons having the cure of souls therein, or serving the same, in like manner, in every respect, as if the same respectively had been ancient, separate, and distinct parishes and parish churches by law, to all intents and purposes."

Extra-parochial places and districts.

Sect. 19. "When and so soon as banns of marriage may be published, and marriages celebrated and solemnized in any church or chapel under the provisions of the above recited acts or this act, the bishop of the diocese within which such church or chapel shall be locally situate, whether in any parish or extra-parochial place or otherwise, shall certify the same, and such certificate shall be kept in the chest of the church or chapel with the books of registry thereof, and a copy thereof shall be

Bishop to certify when marriages may be solemnized in any church or chapel.

(g) Sect. 12 makes provision for the fees in certain cases.

entered in the books of registry of banns and marriages, and a duplicate of such certificate shall be registered in the registry of the diocese, and such certificate shall be deemed and taken to be conclusive evidence in all courts, and in all questions relating to any banns published or marriages celebrated or solemnized in any such church or chapel, that the same might, according to law, respectively be published and celebrated and solemnized in such church or chapel; and all banns published, and marriages celebrated, solemnized, and had in any such church or chapel, according to the laws and canons in force within this realm in that behalf, shall, after the granting of such certificate, be good, valid, legal, and effectual to all intents and purposes whatsoever: provided always, that no banns or marriages respectively published, celebrated, solemnized, or had, according to the laws and canons in force within the realm in that behalf, in any church or chapel in which the same are authorized to be respectively published, celebrated, solemnized, and had by the said recited acts or this act, or either of them, shall be or be deemed or taken to be invalid or illegal, or void or voidable, by reason of any such certificate not having been duly given or registered or entered as hereinbefore required."

7 & 8 Vict.
c. 56.

Case of district assigned
under 1 & 2
Will. 4, c. 38.

By 7 & 8 Vict. c. 56, reciting that "doubts are entertained whether banns of matrimony can be published or marriages be solemnized in churches or chapels to which districts have been or may hereafter be assigned under 1 & 2 Will. 4, c. 38," it is enacted as follows:—

Sect. 1. "In every case in which a district has been or shall be assigned to any church or chapel under the provisions of the said last-mentioned act it shall be lawful for her Majesty's commissioners for building new churches (*h*), with the consent of the bishop of the diocese, in every such case as has come or shall come before the said commissioners under the provisions of the said last-mentioned act, and for the said bishop in every such other case, to determine whether banns of matrimony shall be published and marriages solemnized in any such church or chapel aforesaid or not."

Bishop to
certify that
banns may be
published and
marriages
solemnized.

Sect. 2. "When and so soon as it shall be determined that banns of matrimony may be published and marriages solemnized in any such church or chapel, the bishop of the diocese within which such church or chapel shall be locally situated, whether in any parish or extra-parochial place, or otherwise, shall certify the same, and such certificate shall be kept in the chest of the church or chapel with the books of registry thereof, and a copy thereof shall be entered in the books of the registry of banns and marriages, and a duplicate of such certificate shall be registered in the registry of the diocese, and such certificate shall be deemed and taken to be conclusive evidence in all courts, and in all questions relating to any banns published or marriages

(*h*) Now the Ecclesiastical Commissioners.

solemnized in any such church or chapel, that the same might according to law respectively be published and solemnized in such church or chapel, and that all banns published and marriages solemnized in any such church or chapel, according to the laws and canons in force within this realm in that behalf, shall after the granting of such certificate be good to all intents and purposes whatsoever: Provided always, that no banns or marriages respectively published or solemnized according to the laws and canons in force within the realm in that behalf in any church or chapel in which the same are authorized to be respectively published, solemnized, and had by the said recited acts or this act, or either of them, shall be invalid by reason of any such certificate not having been duly given, or registered or entered, as hereinbefore required: Provided also, that all fees, dues, offerings, and other emoluments on account of such marriages, whether of right or custom, belonging to the incumbent or clerk of any parish, chapelry or place in which such church or chapel has been erected, shall be received by or for or on account of such incumbent or clerk respectively, and be paid over to them, except such of the said fees, dues, offerings, or other emoluments, or such portions thereof, as the said commissioners, with the consent of the bishop of the diocese, the patron, and the said incumbent respectively, in those cases which shall come before the said commissioners, by order made under their common seal, or the bishop of the diocese alone, with the consent of the patron and incumbent, in all other cases, by order under his hand and seal, shall assign to the minister of such church or chapel; and every such instrument of assignment shall be registered in the registry of the bishop of the diocese within which said church or chapel shall be locally situated (*i*): Provided always, that nothing hereinbefore contained shall be construed to take away from existing parish clerks any fees, dues, or emoluments to which they are now by law or custom entitled."

Sect. 3. "And whereas, by error, banns have been published, and divers marriages have been solemnized, in chapels with districts assigned to them under the provisions of the hereinbefore recited acts or some of them, but in which chapels banns could not be legally published, nor marriages by law be solemnized; and it is expedient to remove all doubts, arising from the circumstances aforesaid, touching the validity of such marriages: Be it therefore enacted, that banns already published, and marriages already solemnized, in such chapels as aforesaid, shall not hereafter be questioned on account of the said banns having been published, or the said marriages solemnized, in any such chapel as aforesaid; and the minister or ministers who solemnized the same shall not be liable to any ecclesiastical censure,

Validity of marriages in certain cases not to be questioned.

(*i*) By 14 & 15 Vict. c. 97, s. 18, all or a part of the fees received in churches built under 1 & 2 Will. 4,

c. 38, or this act, may be ordered to be paid to the incumbent of the new church.

or to any other proceedings or penalties whatsoever, by reason thereof; and the registers of all marriages so solemnized as aforesaid, or copies of such registers, shall be received in all courts of law and equity as evidence of such marriages respectively."

Omissions to
authorize
marriages
remedied.

Sect. 4. "Where a chapelry has been already or shall hereafter be assigned to any chapel under the provisions of the hereinbefore recited act 59 Geo. 3, c. 134, and the order in council assigning such chapelry does not direct that marriages may be performed in such chapel, it shall be lawful for her Majesty, by any supplemental order in council, on a representation to be made to her by the said commissioners, with the consent of the bishop of the diocese, to order that marriages may be performed thereafter in such chapel; and that all the fees arising therefrom or a part thereof, should thereafter belong and be paid to the minister of such chapel, or after the next avoidance of the parish church that all or a portion of such fees should belong and be paid to the incumbent of such parish church; and all the laws in force relating to banns of marriage, and marriages in district chapels, and the registering thereof, shall apply to marriages performed under such supplemental order in council."

Orders in
council to be
published in
Gazette.

By sect. 6, every order in council is to be published in the *London Gazette*, "and it shall not be necessary to enrol in the Court of Chancery any map or plan or description of the boundaries of any division or district formed under the provisions of the hereinbefore recited acts, or any other of the Church Building Acts; and a map or plan on which shall be marked such boundaries, and which shall be sealed with the common seal of the said commissioners for building new churches, and the order in council annexed thereto, shall be registered in the registry of the diocese," and "nothing in this act contained shall be taken to repeal or affect any of the authorities contained in 6 & 7 Will. 4, c. 85, for licensing any churches or chapels for the solemnization of marriages therein."

6 & 7 Vict.
c. 37.

New parishes.

By 6 & 7 Vict. c. 37, s. 15, when a church has been consecrated in and for a district constituted under that act, the district shall become a new parish for ecclesiastical purposes, and "it shall be lawful to publish banns of matrimony in such church, and according to the laws and canons in force in this realm to solemnize therein marriages," and to receive fees according to a scale to be fixed by the chancellor of the diocese.

19 & 20 Vict.
c. 104.

Offices of the
church to be
performed in
all the
churches or
chapels on
application of
the incum-
bent.

By 19 & 20 Vict. c. 104, s. 11, "From and after the commencement of this act, the commissioners may, if they shall think fit, upon application of the incumbent of any church or chapel to which a district shall belong, with the consent in writing of the bishop of the diocese, make an order under their common seal, authorizing the publication of banns of matrimony and the solemnization therein of marriages according to the laws and canons now in force in this realm; and all the fees payable

for the performance of such offices, as well as all the mortuary and other ecclesiastical fees arising within the limits of such district, shall be payable and be paid to the incumbent of such district."

Sect. 12 of the act provides for the fees being paid over to the incumbent of the old parish in certain cases (*j*).



SECT. 6.—*Marriage by Banns—Duty and Liability of Clergyman.*

The duty and liability of the clergyman in the matter of banns must be considered both before and after their publication. First, as to his duty and liability before publication.

As to parties dwelling in divers parishes, the rubric is as follows:—

"And if the persons that are to be married dwell in divers parishes, the banns must be asked in both parishes, and the curate of the one parish shall not solemnize matrimony betwixt them without a certificate of the banns being thrice asked from the curate of the other parish."

And by Can. 62, of 1603, "No minister, upon pain of suspension *per triennium ipso facto*, shall celebrate matrimony between any persons without a faculty or licence granted by some of the persons in these our constitutions expressed, except the banns of matrimony have been first published three several Sundays or holy-days in the time of divine service, in the parish churches or chapels where the said parties dwell, according to the Book of Common Prayer [. . .], nor in any private place, but either in the said churches or chapels where one of them dwelleth [. . .], nor when banns are thrice asked, and no licence in that respect necessary, before the parents or governors of the parties to be married, being under the age of twenty and one years, shall either personally, or by sufficient testimony, signify to him their consents given to the said marriage" (*k*).

Pursuant to which canon, about the year 1725, Mr. Bridgen, curate of Shoreditch, London, having married a couple by banns published in that church, and they appearing not to be of age, was articled against before the Chancellor of London (Dr. Henchman), and had sentence against him as being guilty of a breach of the canon. Mr. Bridgen, being a man of character, and it appearing that he was imposed upon, the chancellor and Bishop of London were willing to have mitigated the penalty. But upon a consultation at Doctors Commons, it was agreed,

(*j*) Vide *infra*, Part IX., Chapters V. and VI.

(*k*) The parts in square brackets relating to the time of marriage

were repealed by a new canon of 1888, which will be found later at pp. 608, 630.

Duty before publication.

Certificate.

Canon 62.
Punishment of clergyman unduly celebrating matrimony.

that the canon having fixed a penalty, without leaving any power in the judge to mitigate it, he could only be pronounced guilty of a breach of the canon, and must undergo the penalty of it. Mr. Bridgen appealed to the Arches; where, after deliberation, the sentence was confirmed. Then he petitioned the Archbishop of Canterbury for a dispensation of the canon: but it was agreed by all the civilians, that as the father of the young man had been at the expense of prosecuting, and Mr. Bridgen was convicted of a breach of the canon, he had a right to have lawful punishment thereby directed to be inflicted. And Mr. Bridgen could have no relief. But if there had only been a necessary promoter, or an *ex officio* process, they were of opinion it might be taken off discretionally, as no person could be injured by it.

Archdeacon Sharpe, in his visitation charges, expressed an opinion, that it was the minister's duty to be himself assured of the age, or consent of the parents of the parties, before he marries any couple even by banns; otherwise he will be guilty of a breach of the canon (*l*).

4 Geo. 4, c. 76.

How far ministers not punishable for marrying minors without consent, and in what case publication of banns void.

And this opinion, as the law then stood, was sound; but under the statute now in force—sect. 8 of 4 Geo. 4, c. 76—"No parson, minister, vicar or curate, solemnizing marriages . . . between persons both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriages without consent of parents or guardians, unless such parson, minister, vicar or curate shall have notice of the dissent of such parents or guardians; and in case such parents or guardians, or one of them, shall openly and publicly declare or cause to be declared, in the church or chapel where the banns shall be so published, at the time of such publication, his, her, or their dissent to such marriage, such publication of banns shall be absolutely void."

Ecclesiastical punishment of clandestine marriages.

By the ancient law of our church, "Persons contracting matrimony, and causing the same to be solemnized, knowing any canonical impediments in that behalf, or having strong presumption thereof, shall *ipso facto* incur the sentence of the greater excommunication" (*m*).

"Every priest who shall presume to celebrate matrimony anywhere save in the parish church [where one of the parties or their friends do inhabit (*n*)], without the special licence of the diocesan, or who shall be present thereat, shall be suspended from his office for a whole year" (*o*).

"The foregoing constitution shall be extended to chapels having of old time had parochial rights, and the priest shall incur the said pain *ipso facto*" (*p*).

Of old Time.]—That is, for forty years at least (*q*).

(*l*) Visitation Charges, p. 291.

(*m*) Lind. p. 275.

(*n*) Johnson's Canons, vol. ii. A.D.

1328 [Mepham's Constitutions].

(*o*) Lind. p. 274.

(*p*) Ibid. p. 277.

(*q*) Ibid.

"Priests, who shall knowingly make solemnization of marriages prohibited, or of lawful matrimony between others than their own parishioners, without the licence of the diocesans, or of the proper curates of the persons contracting; also they who shall cause by force or fear clandestine marriages to be solemnized in churches, oratories or chapels, or shall be present thereat, knowing the same, shall incur the sentence of the greater excommunication and be otherwise punished as the law directs" (r).

Between others than their own Parishioners.]—That is, where neither of the parties is of their own parish (s).

Without the Licence of the Diocesans.]—Who having cure throughout the whole diocese, have power to grant licences in all places within their diocese (t).

Or of the proper Curates.]—That is, as to their own parishioners only (u).

Or shall be present thereat.]—And such persons would not be admitted in the spiritual court to prove such marriage, until they should be legally absolved from the sentence incurred thereby. They were indeed *ipso facto* excommunicate, and the ecclesiastical court could *ex officio* take notice of the fact without any declaratory sentence (x).

As to the pain of suspension inflicted by Can. 62, it may be remarked that in our ecclesiastical records we frequently meet with absolutions of clergymen who had celebrated marriages clandestinely, and so late as Archbishop Sancroft's time we find the entire process of such an absolution; but in the more ancient registers, towards the beginning of the Reformation, one and the same dispensation issued for the minister and the two parties, which sort (as well as separate dispensations) are very common in our books (y).

It is in all cases the duty of the clergyman to inform himself by all reasonable means that the publication of banns which he is requested to make, is a due publication with respect both to place and persons. For a neglect of his duty he may be subject to ecclesiastical punishment; and moreover, if he should marry a minor, who is a ward in chancery, without the leave of the court, he will only escape the penalties incident to a contempt of that court by showing that he was deceived after taking every reasonable precaution (z).

Sect. 7, of 4 Geo. 4, c. 76, gives a protection to the clergyman enacting: "That no parson, vicar, minister, or curate shall be obliged to publish the banns of matrimony between any

Duty of clergyman to inform himself before publication.

Protection to clergyman by statute.
Notice of

(r) Lind. p. 276.

(s) Ibid.

(t) Ibid.

(u) Ibid.

(x) See *Scrimshire v. Scrimshire*, 2 Consist. p. 425.

(y) Gibs. p. 425.

(z) *Priestley v. Lamb*, 6 Ves. p. 421; *Millet v. Rowse*, 7 ib. p. 419; *Nicholson v. Squire*, 16 ib. p. 259; *Warter v. Yorke*, 19 ib. p. 451; *Mr. Herbert's Case*, 3 P. Wms. p. 115; *Hannes v. Waugh*, cited 2 ib. p. 112.

names and
place and
time of
abode of
parties to be
given to
minister.

persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns respectively, deliver or cause to be delivered to such parson, vicar, minister, or curate, a notice in writing, dated on the day on which the same shall be so delivered, of their true christian names and surnames, and of the house or houses of their respective abodes within such parish or chapelry as aforesaid, and of the time during which they have dwelt, inhabited or lodged in such house or houses respectively."

If, however, the clergyman does not avail himself of this right to demand a notice of seven days, and he is not bound to do so, he should take care to satisfy himself that no legal impediment disentitles the parties to the publication of banns in his church.

Lord Eldon, in his judgment in *Nicholson v. Squire (a)*, observed:—

*Nicholson v.
Squire.*

"With regard to the clergyman, a notion seems to prevail, that everything is correct, if a paper describing the parties, between whom banns are to be published, being handed up to the clergyman in the usual manner during the service, he publishes them without more. It is true that a marriage by banns is good; though neither of the parties was resident in the parish; but if a clergyman, not using due diligence, marries persons, neither of whom is resident in the parish, he is liable at least to ecclesiastical censure; perhaps to other consequences. It has been uniformly said, especially as to marriages in London, that the clergyman cannot possibly ascertain, where the parties are resident; but that is an objection which a Court, before whom the consideration of it may come, cannot hear. The act of parliament (*b*) has given the means of making the inquiry, and if the means provided are not sufficient, it is not a valid excuse to the clergyman who has not used those means, that he could not find out, where the parties, or either of them, were resident. If he has used the means, given to him, and was misled, he is excusable; but he can never excuse himself if no inquiry was made."

*Toysey v.
Martin.*

But it is also the duty of the clergyman to make due inquiries before he publishes banns; he must take such measures as a man of ordinary discretion would take who wished to avoid being deceived. The degree of caution, the minuteness of inquiry requisite, must depend on the particular circumstances of each case; and with respect to a public forbidding of the banns by a person not standing in the relation of parent or guardian to either of the parties, the clergyman should consider the alleged ground of the prohibition. As, for instance, that one or both of the parties was or were under the legal age for contracting matrimony. It may happen in the case of parties who have attained their majority that the clergyman might be credibly apprised that the parties were within the prohibited degrees, or

(a) 16 Ves. p. 259.

(b) This was 26 Geo. 2, c. 33.

already married, or that one was an idiot or lunatic incapable of consent. In all such cases the law would require the clergyman to exercise due inquiry, and would warrant him in delaying or, as the case may be, finally refusing to publish banns (*c*).

It has been seen that where the dissent of parents or guardians is openly declared at the time of publication of banns such publication becomes "absolutely void." The clergyman who, after such expression of dissent, proceeded with the publication or solemnized a marriage would be liable to the severe penalties by ecclesiastical law specified in the 62nd canon, and perhaps also to penalties by the common law.

Duty where
banns for-
bidden.

In *Wynn v. Davies* (*d*), a case of much importance, both on account of the subject itself, and of the experience of the judge, Sir Herbert Jenner, who delivered the sentence, the amenability of the clergyman, since the enactment of the Marriage Acts, to ecclesiastical law and censures for the irregular solemnization of marriages, is fully discussed and clearly established.

Liability of
officiating
minister to
ecclesiastical
law.

The learned judge says:—

"The principal offence charged, I have already stated to be, that of publishing the banns of marriage, and of marrying persons not resident within the parish; and the objection taken to the admissibility of the articles is, that the offence imputed to the appellant, if a violation of the law, is not cognizable in the Ecclesiastical Courts; and a doubt is raised, whether in fact it ever was cognizable in those Courts; or if so, whether the jurisdiction has not been taken away by subsequent statutes.

Wynn v.
Davies.

"Now that the performance of religious rites and ceremonies was under the superintendence and direction of the ordinary, to whose authority the clergy were amenable, is too clear to admit of dispute, and it would be a waste of time to refer to any authorities in support of this position; in fact, the correction of the clergy in matters relating to the performance of divine worship, is, and always has been, more peculiarly the province of the ordinary.

"That the canon law prohibited clandestine marriages, and inflicted punishment on the parties contracting such marriages, as well as on the minister solemnizing them, is abundantly clear; and it is no less certain that marriages were forbidden to be solemnized by any other than the priest of the parish in which the parties resided; unless with the licence of the diocesan and of the curate of the parish.

"The question then is simply reduced to this, whether the Marriage Act (*e*) by which a clergyman knowingly and wilfully solemnizing marriage without due publication of banns or licence, is liable to be convicted as a felon, and to be trans-

(*c*) *Voysey v. Martin*,—The Bishop of Exeter's judgment; Stephen's Laws relating to the Clergy, vol. i.

p. 743.

(*d*) 1 Curt. p. 69 (1835).

(*e*) 4 Geo. 4, c. 76.

ported for fourteen years, has repealed the canon law, and taken away the ancient jurisdiction of the ecclesiastical court in such matters; and this, undoubtedly, is a very grave and serious question, and deserves great consideration, more especially as there does not, as before observed, appear to have been any actual decision upon it; the only case which is to be found, being that of *Campbell, Clerk v. Aldridge, Clerk* (*f*), which occurred shortly after the marriage act (*g*); that case was to this effect, A clergyman was called upon to answer in the Ecclesiastical Court for solemnizing marriage without banns or licence, and for performing other religious rites without the licence of the ordinary, and a prohibition was prayed upon the suggestion, that since the marriage act the offence was only cognizable in the temporal courts. The court did not absolutely determine the point, but the prohibition was made absolute as to marrying without banns or licence, the plaintiff having leave to declare in prohibition, in order that the question of the marriage act might be more solemnly argued and decided, thereby, as I understand, intimating an inclination against the jurisdiction of the Ecclesiastical Court; not deciding that point, as nothing further appears to have been done in the case; it cannot, therefore, be considered as a binding authority, and the rather, because the arguments upon which the application for a prohibition was founded, or the reasons of the judgment, are not given at length in the report. It is certainly somewhat extraordinary, that, considering the great lapse of time between the passing of the first marriage act and the present day, no traces are to be found of any other proceedings, either against parties or clergymen, in the records of these courts, nor, as I believe, in the reports of cases occurring in the courts of common law; and the absence of any such proceedings may in some degree countenance the suggestion that the general and received opinion has been, that the ecclesiastical jurisdiction no longer exists; otherwise numerous cases have occurred in which it might be supposed that the law would have been put in force; but this is not conclusive, the law may exist, though it may have been suffered to sleep."

"In the absence therefore of any direct precedent, the court must consider this question of law upon principle, and such analogies as decisions in other cases may furnish for its guidance."

After dealing with the objection that the offence attributed to the minister might be felony, and after stating his view that nevertheless the statute did not intend "to repeal the authority of the ecclesiastical courts in cases of this description," the learned judge proceeds:—

"But does it follow that the offence imputed by the present articles necessarily constitutes, or that Mr. Wynn would be convicted of felony, if the whole of the articles were proved?"

(*f*) 2 Wils. p. 79.

(*g*) 26 Geo. 2, c. 33.

It is not in any one part, or in the whole taken together, alleged that the party cited has knowingly and wilfully married any persons without due publication of banns; true it is, that he is accused of publishing the banns of marriage and of solemnizing matrimony between persons neither of whom were residing in his parish, and this may, by reference to the provisions of the act of parliament, be considered as a marriage without due publication of banns; the clear intendment of the law being that banns shall be published between persons resident in the parish, and that banns not so published shall be null and void. But then the minister must knowingly and wilfully offend against the act to incur the penalty. Now, the ecclesiastical law is in this case sought to be enforced against him, for having neglected to satisfy himself that the parties whose banns were published were resident or dwelt within his parish,—for not using the means provided by the law to satisfy himself of the residence of the parties before he published the banns, or before he proceeded to solemnize the marriage between parties whose banns had been published by other persons in his church, and not for any wilful violation of the law.”

“It is, indeed, true, as observed by Dr. Phillimore, that the law is not imperative upon him to require seven days’ notice before he publishes the banns, nor would he be punishable for publishing the banns without that particular notice, or the expiration of the seven days; but if he chooses to dispense with the notice which he is entitled to require, and if it should turn out that the parties are not entitled to have the banns published in his parish, he must take upon himself the consequence of his own neglect to do that which the law has provided for his security; he cannot be allowed to shelter himself under the excuse that he was ignorant of the fact of their non-residence in the parish, when he might, and ought to have inquired into the facts.”

He then cites certain cases, and concludes thus:—

“For the several reasons, therefore, which I have stated, I am of opinion that the original jurisdiction which the Ecclesiastical Courts possessed and exercised in cases of this description, is not taken away by any of the statutes; that the ordinary is still entitled to proceed to the correction of any of his clergy who may offend against the order of the Church, in publishing banns and solemnizing matrimony in any other manner than that prescribed by the law; and that if the charges contained in these articles shall be established by evidence, Mr. Wynn is liable to be canonically punished for such offence.”

A clergyman may be criminally proceeded against in the ecclesiastical court for refusing without just grounds to perform the marriage service (*h*).

Punishment
for refusal
to celebrate
marriage.

(*h*) *Argar v. Holdsworth*, 2 Lee, p. 515.

As to the liability to an action.

The question whether a clergyman is liable to an action for damages for refusing to marry has been raised, but not decided.

In the case of *Davis v. Black* (*i*), the declaration stated that plaintiff (a man) and H. were desirous to intermarry; that a licence was granted to the end that the marriage might be solemnized in the parish church of B. by the rector, vicar or curate thereof, without banns, within three months from the date, H.'s usual place of abode having been in B. for fifteen days immediately before the granting of the licence; provided there should appear to be no impediment by reason of former marriage, consanguinity, &c., nor any suit be depending by reason thereof: and that the celebration should be in the said church between eight and twelve in the forenoon; the declaration also averred that defendant was rector and sole minister of the church of B.; that there was no impediment nor any suit, and that by reason of the premises and by force of the licence it became defendant's duty as rector, on notice of the licence, to solemnize the marriage in the manner and time specified in the licence when thereunto requested; that defendant had notice of the licence, and afterwards, viz., on &c., and on several other days between that day and the death of H., was requested by plaintiff to solemnize the marriage in the manner and time specified in the licence; yet defendant, not regarding his duty, but contriving wrongfully and illegally to harass, oppress and injure the plaintiff, would not, on the said, &c., or any time afterwards, solemnize the marriage, but wrongfully and illegally refused so to do; that while he continued so to refuse H. died, and that by reason, plaintiff lost the benefit of the licence and the marriage, and had been put to expenses which were rendered useless, had been injured in his good name and had suffered anxiety of mind.

This was holden bad after verdict for not averring a request from H., or notice to the defendant that H. was willing that the marriage should take place. Patteson and Coleridge, JJ., thought that the request was insufficiently stated, inasmuch as the licence allowed three months. Patteson, J., also thought that the declaration ought to have averred that the licence was in force at the time of the request. Williams and Coleridge, JJ., thought that the declaration was also bad for not showing that the defendant, at the time of the request, was able to perform the ceremony, and was not engaged in the performance of some other duty. The court doubted whether, under any circumstances, an action at law lies against a clergyman for refusing to perform the marriage ceremony.

It seems doubtful whether he is liable to an indictment for refusing to marry.

In *Regina v. Moorhouse James* (*k*) it was holden that, to

Doubtful whether any liability to indictment.

(*i*) 1 Q. B. p. 900 (1841).

(*k*) 3 C. & K. p. 167; 19 L. J.,

M. C. p. 179; 2 Denison, p. 1;

1 Temple & Mew. p. 300.

sustain an indictment against a clergyman for refusing to marry persons who have obtained a registrar's certificate for that purpose, they must have presented themselves to him to be married at some time when he could legally have married them. It was doubted whether this is in any case an indictable offence, or is merely an ecclesiastical matter. In any case if it is indictable, then it must be averred in the indictment that the parties were persons who could lawfully marry.

In this case the reason of the clergyman for refusing to marry was that the parties had not been confirmed; but, as it has been seen, the indictment was quashed on other grounds.



SECT. 7.—*Marriage without Banns.*

A marriage may also be legally solemnized without the publication of banns by virtue of a licence granted by ecclesiastical authority, of which there are two kinds:—(1) the licence of the bishop or ordinary; (2) the special licence of the Archbishop of Canterbury; or upon the certificate of the registrar.

Three ways
of marrying
without
banns.

1. As to the licence of the ordinary. This power of dispensing with banns is granted to the bishop both by common and by statute law too, viz. 25 Hen. 8, c. 21, s. 9, by which all bishops are allowed to dispense as they were wont to do; and such dispensations have been granted by bishops, ever since Archbishop Mepham's time at least (l).

Licence of
the ordinary.

Such faculties have been very various in point of extent, in many instances requiring a publication, sometimes once and dispensing with two, in other cases twice and dispensing but with one, and again in other cases expressly requiring all the three publications, and dispensing only with time or place (m).

By Can. 101 of 1603, "No faculty or licence shall be granted for solemnization of matrimony henceforth between any parties without thrice open publication of the banns according to the book of Common Prayer, by any person exercising any ecclesiastical jurisdiction or claiming any privileges in the right of their churches; but the same shall be granted only by such as have episcopal authority, or the commissary for faculties, vicars-general of the archbishops and bishops *sede plenâ* or *sede vacante*, the guardian of the spiritualities, or ordinaries exercising of right episcopal jurisdiction in their several jurisdictions respectively, and unto such persons only as be of good state and quality, and that upon good caution and security taken."

Canon 101.

By Can. 102, "The security mentioned shall contain these Canon 102.

(l) Johnson's Canons, vol. ii. A.D. 1328.

(m) Gibs. p. 425.

conditions: First, That at the time of the granting of every such licence there is not any impediment of precontract, consanguinity, affinity, or other lawful cause to hinder the said marriage. Secondly, That there is not any controversy or suit depending in any court before any ecclesiastical judge, touching any contract or marriage of either of the said parties with any other. Thirdly, That they have obtained thereunto the express consent of their parents (if they be living) or otherwise of their guardians or governors. Lastly, that they shall celebrate the said matrimony publicly in the parish church or chapel where one of them dwelleth, and in no other place [and that between the hours of eight and twelve in the forenoon].”

Canons of
1888.

But by 4 Geo. 4, c. 76, s. 15, this security is no longer to be required. The portion in square brackets was expressly repealed by the Canons of 1888. A new canon was then enacted, which is as follows: “All licences henceforth granted for solemnization of matrimony betwixt any parties without publication of banns shall contain the condition that the said matrimony shall be celebrated between the hours of eight in the forenoon and three in the afternoon.”

Canon 103.

By Can. 103 of 1603, “For the avoiding of all fraud and collusion in the obtaining of such licences and dispensations, we further constitute and appoint that before any licence for the celebration of matrimony without publication of banns be had or granted, it shall appear to the judge by the oaths of two sufficient witnesses, one of them to be known either to the judge himself, or to some other person of good reputation then present, and known likewise to the said judge, that the express consent of the parents, or parent if one of them be dead, or guardians or guardian of the parties, is thereunto had and obtained. And furthermore, That one of the parties personally swear that he believeth there is no let or impediment of precontract, kindred, or alliance, or of any other lawful cause whatsoever, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenour of the aforesaid licence.”

Canon 104.

By Can. 104, “If both the parties which are to marry, being in widowhood, do seek a faculty for the forbearing of banns, then the clauses before mentioned, requiring the parents’ consents, may be omitted: but the parishes where they dwell, both shall be expressed in the licence, as also the parish named where the marriage shall be celebrated. And if any commissary for faculties, vicars-general, or other the said ordinaries, shall offend in the premises or any part thereof, he shall for every time so offending be suspended from the execution of his office for the space of six months; and every such licence or dispensation shall be held void to all effects and purposes as if there had never been any such granted; and the parties marrying by virtue thereof shall be subject to the punishments which are appointed for clandestine marriages.”

The statutory enactments in respect to licence in the present Marriage Act, 4 Geo. 4, c. 76, are as follows (*n*) :—

Sect. 10. "No licence of marriage shall . . . be granted by any archbishop, bishop, or other ordinary, or person having authority to grant such licences, to solemnize any marriage in any other church or chapel than in the parish church or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such licence."

Sect. 11. "If any caveat be entered against the grant of any licence for a marriage, such caveat being duly signed by or on the behalf of the person who enters the same, together with his place of residence and the ground of objection on which his caveat is founded, no licence shall issue till the said caveat, or a true copy thereof, be transmitted to the judge out of whose office the licence is to issue, and until the judge has certified to the registrar that he has examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the licence for the said marriage, or until the caveat be withdrawn by the party who entered the same."

Sect. 14. "Before any such licence be granted, one of the parties shall personally swear before the surrogate, or other person having authority to grant the same, that he or she believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court (*o*), to bar or hinder the proceeding of the said matrimony according to the tenor of the said licence; and that one of the said parties hath, for the space of fifteen days immediately preceding such licence, had his or her usual place of abode within the parish or chapelry within which such marriage is to be solemnized; and where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, that the consent of the person or persons whose consent to such marriage is required under the provisions of this act hath been obtained thereto: Provided always, that if there shall be no such person or persons having authority to give such consent, then, upon oath made to that effect by the party requiring such licence, it shall be lawful to grant such licence notwithstanding the want of any such consent."

Sect. 15. "It shall not be required of any person applying for any such licence to give any caution or security, by bond or otherwise, before such licence is granted; any thing in any act or canon to the contrary thereof notwithstanding."

(*n*) The stamp duty on a "licence for marriage not special" is fixed by the schedule to 54 & 55 Vict. c. 39 (tit. "Licence"), at ten shillings.

(*o*) See the curious case of the Prince of Capua, May 5, 1836,

reported in the "Times." The Neapolitan ambassador entered a caveat against the licence for his royal highness's marriage with a British subject, and afterwards forbade the banns.

4 Geo. 4, c. 76.

Licences to be granted to marry in the church, &c. of such parish only wherein one of the parties resided for fifteen days before.

Where caveat entered, no licence to issue till matter examined by judge.

Oath to be taken before the surrogate as to certain particulars before licence is granted.

Bond not to be required before granting licence.

Surrogate to
take oath of
office.

Sect. 18. "No surrogate hereafter to be deputed by any ecclesiastical judge who hath power to grant licences, shall grant any such licence until he hath taken an oath before the said judge, or before a commissioner appointed by commission under the seal of the said judge, which commission the said judge is hereby authorized to issue, faithfully to execute his office according to law, to the best of his knowledge, and hath given security by his bond in the sum of one hundred pounds to the bishop of the diocese, for the due and faithful execution of his said office."

If marriages
by licence be
not solemn-
ized within
three months
new licence to
be obtained.

Sect. 19. "Whenever a marriage shall not be had within three months after the grant of a licence by any archbishop, bishop, or any ordinary or person having authority to grant such licence, no minister shall proceed to the solemnization of such marriage until a new licence shall have been obtained, unless by banns duly published according to the provisions of this act."

In what cases
marriage
void.

By sect. 22, "If any person shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published unless by special licence as aforesaid, or shall knowingly and wilfully intermarry without due publication of banns or licence from a person or persons having authority to grant the same first had and obtained or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriage of such persons shall be null and void to all intents and purposes whatsoever (*p*)."

10 & 11 Vict.
c. 98.

Jurisdiction of
ecclesiastical
authorities
other than
bishops to
issue licences.

By 10 & 11 Vict. c. 98, s. 5, already referred to (*q*), it is enacted that, "All authorities, save and except the authority of the bishop of whose diocese any portion has been or may hereafter be taken away and added to another diocese under the provisions of the hereinbefore recited act, shall continue to grant marriage licences in the same manner and within the same district as they might have done before the passing of the said act: Provided always, that nothing herein contained shall be construed to interfere with the jurisdiction or concurrent jurisdiction, as the case may be, of the bishops of the several dioceses in England to grant marriage licences in and throughout the whole of their dioceses as such are now or hereafter may be limited or constituted."

Licence
granted by
wrong
authority.

In *Balfour v. Carpenter* (*r*), an article of an allegation was admitted which pleaded that a licence granted by the Bishop of Winchester's commissary for Surrey would not be valid for a marriage contracted within the diocese of Winchester, but without the jurisdiction of the commissary of Surrey. Sir John Nicholl admitted this article, observing it was a new case, and

(*p*) 3 Geo. 4, c. 75; 4 Geo. 4, c. 5, validated marriages under licences granted in particular cases without the consents required by

the then Marriage Act.

(*q*) Vide supra, p. 215.

(*r*) 1 Phillim. p. 204.

that it was not clear from doubt, even if it were an invalid licence; for on the face of the act there would be a question whether a marriage would be void solemnized without fraud under a licence given by a person not having authority to grant the same: the point was not decided. But in *Dormer v. Williams* (s), the marriage of parties under a licence from a person not having authority to grant the same was holden not to be void by 4 Geo. 4, c. 76, unless both parties willingly and knowingly intermarried by such licence. In that case the libel was rejected.

In *Greaves v. Greaves* (t), the parties were married at their parish church on the 18th of June, 1857. The licence for their marriage did not issue till the 19th. The husband knew at the time of the marriage that the licence was not in existence; but the wife was ignorant of the fact and believed that all needful formalities had been observed. It was holden that the parties had not knowingly and wilfully intermarried without licence, and that the marriage was not void.

Marriage
before licence.

In *Ewing v. Wheatley* (u), Lord Stowell said, "In the description of persons there may be fraud that would vitiate the licence, but the mere exaggeration of fortune and rank will not have that effect . . . that a man should represent himself of superior condition and expectations will not of itself invalidate a marriage, as the law expects that parties should use timely and effectual diligence in obtaining correct information on such points. It is perfectly established that no disparity of fortune, or mistake as to the qualities of the person, will impeach the vinculum of marriage, and the mere description is not a constituent part of the affidavit. . . . It appears that the true and proper name of 'Ewing' was written 'Ewen' in the licence; that the man altered it as the parties were going together to Church to the right spelling of that name: The original description was not so materially at variance with the true name as to make the licence, in the terms in which it was granted, invalid, and unless it was invalid before this alteration, it could not be considered as fraudulent to make the alteration. In licences the identity is the material circumstance to which the court principally looks. In banns it is the proclamation, which is defective in the way of notice, if there is any material variance. In the present case it is impossible to attach any fraudulent intention on this act."

What consti-
tutes fraud
in a licence.
Error nominis.

The same doctrine is laid down by the same high authority in *Cope v. Burt* (v), who in that case also said, "There is no averment that a licence obtained in one name was transferred to another person; if that case should occur, and it should appear that a licence was procured for one person was transferred to another, it might be a fraud which the court would be bound to notice."

(s) 1 Curt. p. 874. This was the first case which had arisen upon the construction of the 22nd section of 4 Geo. 4, c. 76.

(t) 41 L. J., P. & M. p. 66.

(u) 2 Consist. p. 175.

(v) 1 Consist. p. 438.

In *Clowes v. Jones* f. c. *Clowes*, a suit of nullity of marriage, instituted by reason of imposition practised by the wife on the husband as to her name and condition, the licence being in a false name, unknown to the husband, was not sustained, the libel having been rejected on the ground that there was *error nominis* only, and not *error de personâ*; there was also no fraud proved as to obtaining the licence (x).

In another case, B. and C., man and woman, both of full age, intending to marry, B., with the knowledge of C., in his statement to the surrogate, and affidavit in pursuance therewith, omitted one of C.'s names, gave her place of residence falsely, and falsely described his own residence and occupation, with the view, as was alleged, of fraudulently obtaining the licence from the surrogate. C. petitioned for a declaration of nullity, but the Court held the marriage to be valid, and confirmed the distinction between banns and licences which had been adverted to in previous cases (y).

Punishment
for false oath
in affidavit to
lead licence.

But the party practising a fraud by which a licence is obtained, that is, by swearing falsely in the affidavit which must precede the grant of the licence, is criminally punishable: thus A. was indicted for making a false oath before a surrogate, for the purpose of obtaining a marriage licence: and it was holden, (1) That a surrogate has a general power to administer an oath in that behalf, so as to make a false oath a misdemeanor. (2) That such false oath is a misdemeanor, as being made with a fraudulent intention in a matter of public concern. (3) That it is immaterial whether the marriage actually took place or no. (4) *Quære*, whether such false oath be indictable as perjury (z).

Duty of the
clergyman as
to marrying
by licence.

In *Ewing v. Wheatley* (a), quoted above, Lord Stowell said, that the clergyman, if he had been aware of the variation in the surname, might properly have hesitated; and in *Argar v. Holdsworth*, Sir G. Lee said, "I was of opinion a licence was a legal authority for marriage, and that a minister was guilty of a breach of his duty who should refuse to marry pursuant to a proper licence from his ordinary. If Holdsworth had reason to believe the licence was obtained fraudulently, and only delayed to gain time for inquiry, that would be proper matter for his defence" (b).

4 Geo. 4, c. 76.
Special
licence.

2. By 4 Geo. 4, c. 76, s. 20, it is provided that "Nothing hereinbefore contained shall be construed to extend to deprive the Archbishop of Canterbury and his successors, and his and their proper officers, of the right which hath hitherto been used, in virtue of a certain statute made in the 25th year of the reign of the late King Henry the Eighth, intituled 'An Act concerning Peterpence and Dispensations,' of granting special licence to marry at any convenient time or place."

(x) *Clowes v. Jones* f. c. *Clowes* (1842), 2 N. C. p. 1.

(y) *Beavan* f. c. *M'Mahon* v. *M'Mahon* (1861), 2 Sw. & Tr. p. 230.

(z) *Reg* v. *Chapman* (1849), 1

Denison, p. 432. See *Phillimore* v. *Machon*, 1 P. D. p. 481.

(a) 2 Consist. p. 175.

(b) 2 Lee, p. 515; see also *Sullivan* v. *Sullivan*, 2 Consist. p. 253.

By the statute 25 Hen. 8, c. 21, power is given to the Archbishop of Canterbury to grant faculties, dispensations, and licences, as the pope had done before (c). And by the same statute it is enacted, that all children procreated after solemnization of any marriages to be had by virtue of a licence or dispensation from the Archbishop of Canterbury, shall be admitted, reputed, and taken as legitimate in all courts and other places, and inherit the inheritance of their parents and ancestors (d).

This reservation to the archbishop was similarly made in 26 Geo. 2, c. 33; and has been preserved by 6 & 7 Will. 4, c. 85, s. 1 (e).

By 24 & 25 Vict. c. 98, s. 35, "Whosoever shall forge or fraudulently alter any licence, or certificate for marriage, or shall offer, utter, dispose of or put off any such licence or certificate, knowing the same to be forged or fraudulently altered, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

Punishment
for forgery
of licence.

3. As to marriages contracted under the authority of the registrar's certificate, 6 & 7 Will. 4, c. 85, as modified by 19 & 20 Vict. c. 119, s. 6, enacts as follows:—

Registrar's
certificate.

Sect. 4. "In every case of marriage intended to be solemnized in England . . . according to the rites of the Church of England (unless by licence or by special licence, or after publication of banns), and in every case of marriage intended to be solemnized in England after the said first day of March, according to the usages of the Quakers or Jews, or according to any form authorized by this act, one of the parties shall give notice under his or her hand . . . to the superintendent registrar of the district (f) within which the parties shall have dwelt for not less than seven days then next preceding, or if the parties dwell in the districts of different superintendent registrars shall give the like notice to the superintendent registrar of" [one of such districts], "and shall state therein the name and surname, and the profession or condition of each of the parties intending marriage, the dwelling place of" [the party giving the

6 & 7 Will. 4,
c. 85; 19 & 20
Vict. c. 119.

Notice of
intended
marriage to
be given to
superinten-
dent registrar
of district.

(c) The Bishop of Sodor and Man seems to have power to grant a special licence in his diocese. *Piers v. Piers*, 2 H. L. p. 331.

(d) As to the proof of the grant of such a licence, see *Doe d. Egremont v. Grazebrook*, 4 Q. B. p. 406; 3 G. & D. p. 334.

(e) The stamp duty on "a licence for marriage, special" is fixed by the schedule to 54 & 55 Vict. c. 39, tit. "Licence," at five pounds.

(f) See the modifications of this provision as to districts in 3 & 4 Vict. c. 72, s. 1, which prevents certificates being granted for marriages in buildings out of the superintendent registrar's district except in the cases there specified. See also *Ex parte Brady*, 8 Dowling, p. 332; and *Reg. v. Moorhouse-James*, 2 Denison, p. 1; and *supra*, p. 606.

notice] (*g*), and the time not being less than seven days during which he or she has dwelt therein, and the church or other building in which the marriage is to be solemnized; provided that if either party shall have dwelt in the place stated in the notice during more than one calendar month, it may be stated therein that he or she hath dwelt there one month and upwards."

Issue of superintendent registrar's certificate may be forbidden.

Sect. 9. "Any person authorized in that behalf may forbid the issue of the superintendent registrar's certificate by writing at any time before the issue of such certificate the word 'forbidden' opposite to the entry of the notice of such intended marriage in the marriage notice book, and by subscribing thereto his or her name and place of abode, and his or her character, in respect of either of the parties, by reason of which he or she is so authorized; and in case the issue of any such certificate shall have been so forbidden the notice and all proceedings thereupon shall be utterly void."

Caveat may be lodged with superintendent registrar against grant of licence or certificate.

Sect. 13. "Any person, on payment of five shillings, may enter a caveat with the superintendent registrar against the grant of a certificate or a licence (*h*) for the marriage of any person named therein; and if any caveat be entered with the superintendent registrar, such caveat being duly signed by or on behalf of the person who enters the same, together with his or her place of residence, and the ground of objection on which his or her caveat is founded, no certificate or licence shall issue or be granted until the superintendent registrar shall have examined into the matter of the caveat, and is satisfied that it ought not to obstruct the grant of the certificate or licence for the said marriage, or until the caveat be withdrawn by the party who entered the same; provided that in cases of doubt it shall be lawful for the superintendent registrar to refer the matter of any such caveat to the registrar general, who shall decide upon the same: Provided likewise, that in the case of the superintendent registrar refusing the grant of the certificate or licence, the person applying for the same shall have a right to appeal to the registrar general, who shall thereupon either confirm the refusal or direct the grant of the certificate or licence."

Marriages not to be solemnized until after twenty-one days after entry of notice, unless by registrar's licence.

Sect. 14. "No marriage after such notice as aforesaid, unless by virtue of a licence to be granted by the superintendent registrar, shall be solemnized or registered in England until after the expiration of twenty-one days after the day of the entry of such notice as aforesaid. . . ."

New notice required after three months.

Sect. 15. "Whenever a marriage shall not be had within three calendar months after the notice shall have been so entered by the superintendent registrar, the notice and certificate, and any licence which may have been granted thereupon, and all other proceedings thereupon, shall be utterly void; and no

(*g*) The words in square brackets are the modifications introduced by 19 & 20 Vict. c. 119, s. 6.

(*h*) By s. 11, registrar's licences under that act are not to be granted for marriages in churches or chapels of the Church of England.

person shall proceed to solemnize the marriage, nor shall any registrar register the same, until new notice shall have been given, and entry made, and certificate thereof given, at the time and in the manner aforesaid."

Sect. 16. "The superintendent registrar's certificate, or in case the parties shall have given notice to the superintendent of different districts, the certificate of each superintendent shall be delivered to the officiating minister, if the marriage shall be solemnized according to the rites of the Church of England. . . ."

And 1 Vict. c. 22 enacts as follows:—

By sect. 1, reciting 6 & 7 Will. c. 85 and c. 86, "That where in the said act for marriages in England provision is made for giving notice of marriage to any registrar, and where in the last-recited act, or any schedule thereunto annexed, mention is made of any such notice, or of the registrar's certificate of any such notice, the same shall be construed respectively to mean the notice to be given to the superintendent registrar, and the certificate thereof to be issued by the superintendent registrar, according to the provisions for that purpose contained in the last-recited act."

Superintendent registrar's certificate or licence to be delivered to person by or before whom marriage is solemnized.

1 Vict. c. 22.

Meaning of the words notice to the registrar and registrar's certificate.

Sect. 36. "And whereas it is enacted, in the said recited act for marriages in England, that where by any law or canon in force before the passing of the said act, it is provided that any marriage may be solemnized after publication of banns, such marriage may be solemnized in like manner, on production of the registrar's certificate, as thereafter provided; Be it enacted, that the giving of notice to the superintendent registrar, and the issue of the superintendent registrar's certificate, as in the said act and by this act provided, shall be used and stand instead of the publication of banns to all intents and purposes, where no such publication shall have taken place; and every parson, vicar, minister, or curate in England, shall solemnize marriage after such notice and certificate as aforesaid, in like manner as after due publication of banns: Provided always, that the church wherein any marriage according to the rites of the Church of England shall be so solemnized shall be within the district of the superintendent registrar, by whom such certificate as aforesaid shall have been issued."

Notice to superintendent registrar, and issue of certificate by him, to be used and stand instead of banns.

Doubts have arisen as to whether under these sections the clergyman be compellable to solemnize marriage upon production of this certificate, or whether it be only optional to him to do so. The question never received a formal judicial decision.

19 & 20 Vict. c. 119 amends the provisions of 6 & 7 Will. 4, c. 85, 1 Vict. c. 22, and 3 & 4 Vict. c. 72 (i), and enacts as follows:—

19 & 20 Vict. c. 119.

Sect. 2. "In case any party shall intend marriage, under the provisions of any of the said recited acts or of this act, the party

Every notice of marriage to be accom-

(i) An Act to provide for the District in or near to which the Parties reside. Vide supra, p. 613.

panied by a solemn declaration by one of the parties, that there is no lawful hindrance to such marriage.

so intending marriage shall, at the time of giving to the superintendent registrar or respective superintendent registrars, as the case may be, the notice required by the said recited acts or either of them, make and sign or subscribe a solemn declaration in writing, in the body or at the foot of such notice, that he or she believes that there is no impediment of kindred or alliance or other lawful hindrance to the said marriage, and that the parties to the said marriage, in case the marriage is intended to be had without licence, have, for the space of seven days immediately preceding the giving of such notice, had their usual place of abode and residence within the district of the superintendent registrar or respective superintendent registrars to whom such notice or notices, as the case may be, shall be so given; or, in case such marriage is intended to be had by licence, that one of the said parties hath for the space of fifteen days immediately preceding the giving of such notice had his or her usual place of abode and residence within the district of the superintendent registrar to whom such notice shall be so given; and when either of the parties intending marriage, and not being a widower or widow, shall be under the age of twenty-one years, the party making such declaration shall further declare that the consent of the person or persons whose consent to such marriage is by law required has been given, or (as the case may be) that there is no person whose consent to such marriage is by law required; and every declaration so made as aforesaid shall be signed and subscribed, by the party making the same, in the presence of the superintendent registrar to whom the notice of marriage containing such declaration is given, or in the presence of his deputy, or of some registrar of births or deaths or of marriages for the district in which the party giving such notice resides, or of the deputy of such registrar, who shall respectively attest the same by adding thereto his name, description and place of abode; and no certificate or licence for marriage shall be issued or granted pursuant to any such notice as aforesaid unless the said notice be accompanied by such solemn declaration duly made and signed or subscribed and attested as aforesaid; and every person who shall knowingly or wilfully make and sign or subscribe any false declaration, or who shall sign any false notice for the purpose of procuring any marriage under the provisions of any of the said recited acts or this act, shall suffer the penalties of perjury."

Persons making wilfully false declarations to suffer the penalties of perjury.

Form of notice of marriage.

Sect. 3. "Every notice of marriage which shall be given under the provision of any of the said recited acts or of this act, after this act shall have come into operation, shall be in the form of schedule (A.) to this act annexed, or to the like effect; and in every case where the marriage is intended to be had and solemnized under the provisions of the said recited act 3 & 4 Viet. c. 72, such notice shall, in addition to the several particulars comprised in the said schedule, contain the declaration required to be made by one of the parties to such intended

marriage, pursuant to the second section of the said last-mentioned act; and the superintendent registrar to whom any such notice of marriage shall be so given shall forthwith enter the particulars, and the date thereof, and the name of the party giving the same, into the marriage notice book; and for every such entry the superintendent registrar shall be entitled to have a fee of one shilling."

SCHEDULE (A.)

Form of Notice of Marriage.

To the superintendent registrar of the district of *Hendon* in the county of *Middlesex*.

I, the undersigned *James Smith*, hereby give you notice, That a marriage is intended to be had *without* [or by, as the case may be,] licence within three calendar months from the date hereof between me and the other party herein named and described; (that is to say,)—

Name and Surname.	Con- dition.	Rank or Profession.	Age.	Dwell- ing- Place.	Length of Resi- dence.	Church or Building in which the Marriage is to be solemnized.	District and County in which the Parties re- spectively dwell.
<i>James Smith.</i>	<i>Widower.</i>	<i>Ironmonger.</i>	<i>Twenty- five Years.</i>	<i>16, High St., Hendon, Middlesex.</i>	<i>Seven or Fifteen Days, as the Case may be.</i>	<i>Sion Chapel, West Street, Tunbridge, Kent.</i>	<i>Hendon, Middlesex.</i>
<i>Martha Green.</i>	<i>Spinster.</i>		<i>Nineteen Years.</i>	<i>Grove Farm, Tunbridge, Kent.</i>	<i>More than a Month.</i>		<i>Tunbridge, Kent.</i>

And I hereby solemnly declare, that I believe there is no impediment of kindred or alliance, or other lawful hindrance to the said marriage, and that I, the above named *James Smith*, have for the space of *fifteen* days immediately preceding the giving of this notice had my usual place of abode and residence [If the marriage is intended to be had in a church or chapel of the Church of England insert in this space the following words, "in the parish of _____," or "in the ecclesiastical district of _____," (as the case may be,) and add the name of the parish or ecclesiastical district in which one of the parties resides] within the above-mentioned district of *Hendon*.

[And I further declare, That I am not a minor under the age of twenty-one years, and that the other party herein named and described is not a minor under the age of twenty-one years. (If one or both of the parties be under age these words must be expunged.)] (Or, as the case may be,)

And I further declare, that she [or I] the said *Martha Green*, not being a widow [or widower], is [or am] a minor under the age of twenty-one years, and that the consent of *George Kilpin*,

whose consent to *her* [*or my*] marriage is required by law, has been duly given and obtained thereto [*or* "that there is no person whose consent to *her* [*or my*] marriage is by law required" (*as the case may be*)].

And I make the foregoing declarations solemnly and deliberately, conscientiously believing the same to be true, pursuant to the provisions of an act passed in the year of her Majesty Queen Victoria, chapter intituled "An Act to amend the Provisions of the Marriage and Registration Acts," well knowing that every person who shall knowingly or wilfully make and sign or subscribe any false declaration or who shall sign any false notice for the purpose of procuring any marriage under the provisions of the said act above mentioned, or any of the several acts therein recited, shall suffer the penalties of perjury. In witness whereof I have hereunto set and subscribed my hand, this *fifth* day of *January*, 1858.

Signed and declared by the
above-named *James Smith*
in the presence of

James Smith.

[*Here let the witness attest the signature of the party giving the notice according to one or other of the following "examples:"—*]

Example.	Name of Witness.	Description.	Place of Abode.
1	<i>John Coz</i>	<i>Superintendent Registrar of Hendon District [or Deputy Superintendent Registrar of Hendon District].</i>	<i>Hendon, Middlesex.</i>
2	<i>Peter Green</i>	<i>Registrar of Marriages for the Hendon District.</i>	<i>Hendon, Middlesex.</i>

Notice of marriage without licence to be affixed to superintendent registrar's office.

Section 4. "In case any party shall intend marriage without licence under the provisions of any of the said recited acts or of this act, the superintendent registrar to whom notice of such intended marriage has been given shall cause the notice of marriage, or a true and exact copy thereof, as entered in the marriage notice book, under the hand of such superintendent registrar, to be suspended or affixed in some conspicuous place in the office of the said superintendent registrar during twenty-one successive days next after the day of the entry of such notice in his 'marriage notice book,' before any marriage shall be solemnized in pursuance of such notice, and after the expiration of twenty-one days next after the day of the entry of such notice in his 'marriage notice book' the superintendent registrar shall issue under his hand, upon the request of the party giving such notice, a certificate in the form or to the effect of the certificate set forth in schedule (B.) to this act annexed, provided that in the meantime no lawful impediment to the issuing of such certificate be shown to the satisfaction of the same superintendent registrar, and provided the issue of such certificate

shall not have been forbidden in the manner provided by either of the said firstly and secondly recited acts by some person or persons authorized in that behalf; and every such certificate shall state the particulars set forth in the said notice, and the day on which the same notice was entered, and that the issue of such certificate has not been forbidden by any person or persons authorized in that behalf; and for every such certificate the superintendent registrar shall be entitled to have and receive a fee of one shilling; and at any time within three calendar months next after the day of the entry of such notice the intended marriage may be solemnized under the authority of the said certificate; and every superintendent registrar's certificate for the marriage duly issued under the provisions of this act shall have the same force validity and effect as the like certificate issued under the provisions of the said recited acts or either of them would have had in case this act had not been passed."

"SCHEDULE (B.)

Form of Superintendent Registrar's Certificate.

I, *John Cox*, superintendent registrar of the district of *Hendon* in the county of *Middlesex*, do hereby certify that on the *5th* day of *January*, 1857, notice was duly entered in the marriage notice book of the said district of the marriage intended between the parties hereinafter named and described, and of such marriage being intended to be solemnized *without* [or by, as the case may be] licence, delivered under the hand of *James Smith*, one of the parties; that is to say:—

Name.	Con- dition.	Rank or Profession.	Age.	Dwelling- Place.	Length of Resi- dence.	Church or Building in which the Marriage is to be solemnized.	District and County in which the Parties re- spectively dwell.
<i>James Smith.</i>	<i>Widower.</i>	<i>Ironmonger.</i>	<i>Twenty- five Years.</i>	<i>16, High St., Hendon, Middlesex.</i>	<i>Fifteen Days.</i>	<i>Sion Chapel, West Street, Tunbridge, Kent.</i>	<i>Hendon, Middlesex.</i>
<i>Martha Green.</i>	<i>Spinster.</i>		<i>Nineteen Years.</i>	<i>Grove Farm, Tunbridge, Kent.</i>	<i>More than a Month.</i>		<i>Tunbridge, Kent.</i>

Date of entry of notice,)
5th January, 1857.) The issue of this certificate has not
Date of certificate given,)
27th January, 1857.) been forbidden by any person
authorized to forbid the issue
thereof.

Witness my hand, this *twenty-seventh* day of *January*, 1857.

(Signed)

John Cox,

Superintendent Registrar.

This certificate will be void unless the marriage is solemnized within three calendar months after the date of the entry of notice, namely, on or before the *5th* day of *April*, 1857."

Sects. 7 and 8 refer to cases where one of the parties intending marriage resides in Ireland or in Scotland respectively.

Such marriages not to be celebrated in church without incumbent's consent.

Sect. 11. "No such marriage as aforesaid shall be solemnized . . . in any church or chapel of the united church of England and Ireland without the consent of the minister thereof, nor in such latter case by any other than a duly qualified clergyman of the said united church, or with any other forms or ceremonies than those of the said united church."



SECT. 8.—*Civil Marriages—Subsequent Religious Service.*

Under the acts last-mentioned (*k*) marriages may be civilly contracted before the registrar appointed for the purpose, or they may be celebrated in a building registered as a church or chapel of some religious body other than the church of England, and with the religious rites of that body under the conditions prescribed by those acts. It is not necessary to treat of these in detail. The last act 19 & 20 Vict. c. 119, provides as follows:—

19 & 20 Vict. c. 119.

Proof of the observance of this act and of the recited acts, matters not necessary to the validity of marriages.

Sect. 17. "After any marriage shall have been solemnized, under the authority of any of the said recited acts or of this act, it shall not be necessary in support of such marriage to give any proof of the actual dwelling or of the period of dwelling of either of the parties previous to the marriage within the district stated in any notice of marriage to be that of his or her residence, or of the consent to any marriage having been given by any person whose consent thereto is required by law, or that the registered building in which any marriage may have been solemnized had been certified according to law as a place of religious worship, or that such building was the usual place of worship of either of the parties, nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage; and all marriages which heretofore have been or which hereafter may be had or solemnized, under the authority of any of the said recited acts or of this act, in any building or place of worship which has been registered pursuant to the provisions of the said act 6 & 7 Will. 4, c. 85, but which may not have been certified as required by law, shall be as valid in all respects as if such place of worship had been so certified."

Marriages under this act good and cognizable.

Sect. 23. "Every marriage solemnized under any of the said recited acts or of this act shall be good and cognizable in like

(*k*) 6 & 7 Will. 4, c. 85; 1 Vict. c. 22; 3 & 4 Vict. c. 22; 19 & 20 Vict. c. 119. From the time, at any rate, of Lord Hardwicke's Act, 26 Geo. 2, c. 33, to that of 6 & 7

Will. 4, c. 85, the only way of solemnizing marriage, except for Quakers and Jews, who were specially exempted, was to use the rites of the church.

manner as marriages before the passing of the first-recited act according to the rites of the church of England" (1).

Provision has been made by section 12 of 19 & 20 Vict. c. 119, for the blessing of the church being given after such marriage has been so contracted in the following words :

Persons desirous may add the religious ceremony ordained by the church.

"If the parties to any marriage contracted at the registry office of any district conformably to the said recited acts or any of them, or to the provisions of this act, shall desire to have the religious ceremony ordained or used by the church or persuasion of which such parties shall be members to the marriage so contracted, it shall be competent for them to present themselves for that purpose to a clergyman or minister of the church or persuasion of which such parties shall be members, having given notice to such clergyman or minister of their intention so to do ; and such clergyman or minister, upon the production of their certificate of marriage before the superintendent registrar, and upon the payment of the customary fees (if any), may, if he shall see fit, in the church or chapel whereof he is the regular minister, by himself or by some minister nominated by him, read or celebrate the marriage service of the persuasion to which such minister shall belong : Provided always, that no minister of religion who is not in holy orders of the . . . church of England . . . shall under the provisions of this act officiate in any church or chapel of the . . . church of England . . . ; but nothing in the reading or celebration of such service shall be held to supersede or invalidate any marriage so previously contracted, nor shall such reading or celebration be entered as a marriage among the marriages in the parish register : Provided also, that at no marriage solemnized at the registry office of any district shall any religious service be used at such registry office."

Marriages of British subjects abroad have been provided for by several acts (m). The present ruling one is the Foreign Marriage Act, 1893, 55 & 56 Vict. c. 23 (n).

Foreign marriages.

SECT. 9.—*Circumstances of Marriage.*

By the common law of England and before the passing of recent statutes marriage could not be validly celebrated in England or Ireland except by a priest, or possibly a deacon, in holy orders (o).

By whom marriage celebrated.

Cases have arisen in which a pretended priest has celebrated

(1) On the construction of these acts, see *Holmes v. Simmons*, f. c. *Holmes*, L. R., 1 P. & D. 523.

(m) The former acts (now repealed) are 12 & 13 Vict. c. 68 ; 31

& 32 Vict. c. 61 ; 53 & 54 Vict. c. 47 ; 54 & 55 Vict. c. 74. Vide *infra*, sect. 11.

(n) Vide *infra*, p. 626.

(o) A., a member of the Estab-

a marriage in church. With respect to such a *de facto* marriage, Lord Stowell said:—

Marriage by
a pretended
clergyman.

“But if the facts were simply these, that being a young unmarried woman, she was imposed upon by a pretended Clergyman, and a supposititious licence, the matter might perhaps be deemed an arguable point, whether a marriage had under such an atrocious imposition practised upon her might not bind the guilty artificer of such fraud. It seems to be a generally-accredited opinion that if a marriage is had by the ministration of a person in the Church who is ostensibly in Holy Orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married are not expected to ask for a sight of the minister's letters of orders; and if they saw them, could not be expected to inquire into their authenticity” (*p*).

The same view was taken by Lords Campbell and Cottenham and by the Lord Chancellor in *Reg. v. Millis* (*q*).

4 Geo. 4, c. 76.

And now, by sect. 22 of 4 Geo. 4, c. 76, if both parties knowingly acquiesce in the solemnization of marriage by a person not in holy orders, such marriage is void—an enactment which by necessary implication confirms the law laid down by Lord Stowell as to the validity of a marriage where one party only has been cognisant that the officiating person was not a priest.

51 & 52 Vict.
c. 28.

This being so, the recent Act, 51 & 52 Vict. c. 28, reciting the forgery and false pretences of a pretended priest who had affected to solemnize marriages, and that doubts had been entertained as to such marriages which it was expedient to remove,

blished Church in Ireland, went, accompanied by B., a Presbyterian, to the house of C., a regularly placed minister of the Presbyterians of the parish where C. resided, and there entered into a present contract of marriage with the said B.; the minister performing a religious ceremony between them, according to the rites of the Presbyterian Church. A. and B. lived together for some time as man and wife; A. afterwards, B. being still alive, married another person, in a parish church in England: *Quære*, whether the first contract thus entered into was sufficiently a marriage to support an indictment against A. for bigamy. Lord Brougham, Lord Denman and Lord Campbell were of opinion that it was. The Lord Chancellor, Lord Cottenham and Lord Abinger were of opinion that it was not. The lords being thus divided, the rule “*semper præsumitur pro negante*” applied and judgment was given for the defendant in

error. *Reg. v. Millis*, 10 Cl. & Fin. p. 534; 8 Jur. p. 717.

The plaintiff in an action of crim. con. was bound to prove a marriage valid in all respects, and it was not sufficient *primâ facie* evidence on his part, to show that he and his alleged wife went through a religious ceremony with the *bonâ fide* intention of thereby contracting a valid marriage, and afterwards lived together as man and wife, in the belief that they had thereby contracted a valid marriage, if in law such marriage was not valid. A marriage between English subjects celebrated according to the rites of the Church of England, but not in the presence of a priest in holy orders, is invalid at the common law. *Catherwood v. Caslon*, 13 M. & W. p. 261.

(*p*) *Hawke v. Corri*, 2 Consist. p. 280.

(*q*) See 10 Cl. & Fin. pp. 784, 860, 906.

and enacting that such marriages should be as valid as if the man had been duly ordained, seems unnecessary.

Marriages may be lawfully celebrated in England.

Place of
celebration.

1. In any place under the special licence of the Archbishop of Canterbury (r).

2. Generally in any parish church or in any church or chapel licensed by the ordinary for the celebration of marriages.

3. In certain cases in extra-parochial places.

4. Abroad ;

(α) generally speaking, when solemnized according to the *lex loci* of a Christian state.

(β) Solemnized under the statute 55 & 56 Vict. c. 23.

5. On board one of her Majesty's ships by a lawful chaplain on the high seas by 55 & 56 Vict. c. 23, s. 12.

6. Within the lines of her Majesty's army in a foreign country by a lawful chaplain ; or any person officiating under the orders of the commanding officer (s).

7. In a registered building or at the office of the registrar, under the Acts for marriages without religious ceremonies or with religious ceremonies other than those of the church (t).

It is ordered by the 63rd canon of 1603, that "Every minister who shall hereafter celebrate marriage between any persons contrary to our said constitutions or any part of them under colour of any peculiar liberty or privilege claimed to appertain to certain churches and chapels, shall be suspended *per triennium* by the ordinary of the place where the offence shall be committed. And if any such minister shall afterwards remove from the place where he hath committed that fault, before he be suspended as is aforesaid, then shall the bishop of the diocese, or ordinary of the place where he remaineth, upon certificate under the hand and seal of the other ordinary, from whose jurisdiction he removed, execute that censure upon him." Canon 63.

By 4 Geo. 4, c. 76, s. 2, "In all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place." 4 Geo. 4, c. 76.

Where marriages may be solemnized and banns published.

By sect. 10, "No licence of marriage shall be granted . . . to solemnize any marriage in any other church or chapel than in the parish church or in some public chapel of or belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of fifteen days immediately before the granting of such licence."

There are probably still some ancient chapels in which marriages cannot now legally be solemnized, banns not having been published in them before the first Marriage Act. In the case of *Taunton v. Wyborn* (u), Lord Ellenborough held that the Ancient chapels.

(r) Vide supra, p. 612, and p. 613, note (c), as to the power of the Bishop of Sodor and Man in this respect within his own diocese.

(s) By 55 & 56 Vict. c. 23, s. 22.

(t) Pages 613—621, supra.

(u) 2 Campb. p. 297.

existence of a registry of marriages from 1578, and of the publication of banns from 1754, coupled with the deposition of the clergyman that marriages had to his knowledge been frequently solemnized there, founded a sufficient presumption that banns had been published there before Lord Hardwicke's, *i. e.*, the first Marriage Act.

21 Geo. 3,
c. 53. The object of 21 Geo. 3, c. 53, was to declare all marriages valid which had been celebrated in any consecrated church or chapel since 26 Geo. 2, c. 33.

11 Geo. 4 & 1
Will. 4, c. 18. The object of 11 Geo. 4 & 1 Will. 4, c. 18, s. 5, is to legalize marriages solemnized in chapels of which the consecration is doubtful.

6 Geo. 4, c. 92. For a similar purpose 6 Geo. 4, c. 92, was passed, by s. 2 of which it is enacted, "That it shall and may be lawful for marriages to be in future solemnized in all churches and chapels erected since the passing of the said act in the twenty-sixth year of the reign of his late majesty king George the Second, and consecrated, in which churches and chapels it has been customary and usual before the passing of this act to solemnize marriages; and all marriages hereinafter solemnized therein shall be as good and valid in law as if such marriages had been solemnized in parish churches or public chapels having chapelries annexed, and wherein banns had usually been published before or at the time of passing the said act."

1 Vict. c. 22. By 1 Vict. c. 22, s. 34, marriages may be had in licensed chapels though only one of the parties reside in the district.

Church Build-
ing Acts. The solemnization of marriages in the churches and chapels created by the Church Building and New Parishes Acts has been considered in sect. 5 of this chapter on the subject of banns (*x*).

Church under
repair. In *Stallwood v. Tredger*, Sir J. Nicholl held, and his opinion was confirmed by the Court of Delegates, that the provisions of this statute were not contravened, where a church being under repair (*y*), and shut up, the banns had been published in the church of a parish adjoining to that in which they were married; but he said, "I am not disposed to go to the extent of giving an opinion that under no circumstances would a marriage be void, if contrary to this provision, and had elsewhere than in the church in which the banns were published;—for instance, if the banns were *bonâ fide* and honestly published at York, and the parties were to come to London to be married, whether such a marriage would be void—" (*z*).

4 Geo. 4, c. 76. By 4 Geo. 4, c. 76, s. 12, "All parishes where there shall be no parish church or chapel belonging thereto, or none wherein divine service shall be usually solemnized every Sunday, and all extra-parochial places whatever, having no public chapel wherein banns may be lawfully published, shall be deemed and taken to belong to any parish or chapel next adjoining for the purposes

(*x*) Vide supra, pp. 593—599.

(*y*) See sects. 2 and 3 of 5 Geo. 4, c. 18, s. 2; and see 4 Geo. 4, c. 76, s. 13, immediately following.

c. 32; and 11 Geo. 4 & 1 Will. 4,

(*z*) 2 Phillim. p. 289.

of this act only; and where banns shall be published in any church or chapel of any parish or chapelry adjoining to any such parish or chapelry, where there shall be no church or chapel, or none wherein divine service shall be solemnized as aforesaid, or to any extra-parochial place as aforesaid, the parson, vicar, minister, or curate publishing such banns shall, in writing under his hand, certify the publication thereof in the same manner as if either of the persons to be married had dwelt in such adjoining parish or chapelry."

Sect. 13. "If the church of any parish, or chapel of any chapelry, wherein marriages have been usually solemnized, be demolished in order to be rebuilt, or be under repair, and on such account be disused for public service, it shall be lawful for the banns to be proclaimed in a church or chapel of any adjoining parish or chapelry in which banns are usually proclaimed, or in any place within the limits of the parish or chapelry which shall be licensed by the bishop of the diocese for the performance of divine service during the repair or rebuilding of the church as aforesaid; and where no such place shall be so licensed, then, during such period as aforesaid, the marriage may be solemnized in the adjoining church or chapel wherein the banns have been proclaimed: and all marriages heretofore solemnized in other places within the said parishes or chapelries than the said churches or chapels, on account of their being under repair, or taken down in order to be rebuilt, shall not be liable to have their validity questioned on that account, nor shall the ministers who have so solemnized the same be liable to any ecclesiastical censure, or to any other proceeding or penalty whatsoever."

adjoining
parish, &c.

Where
churches are
demolished or
under repair,
banns to be
proclaimed in
a church or
chapel of an
adjoining
parish, &c.

1 & 2 Vict. c. 107, s. 16, enacts that the Ecclesiastical Commissioners, with the consent of the bishop of the diocese and of the patron of the parish church, and of the vestry or persons possessing the power of vestry, may make any church or chapel the parish church of any parish, and the parish church a district church or chapel of ease; and that the new church shall have all the emoluments of all descriptions, and all the rights and privileges of the ancient parish church; and also that "all acts of parliament, laws and customs relating to the publishing banns of marriage and celebration of marriages, christenings, churchings and burials, and to all ecclesiastical fees, oblations and offerings shall apply to every such church or chapel so constituted the parish church as aforesaid, in like manner in every respect as to the former parish church of the said parish; and such former parish church shall from such time be and be deemed to be a district church or a chapel with or without a district, as the said Commissioners shall in such case direct."

With respect to marriages in places extra-parochial the first act is 20 Vict. c. 19, entitled "An Act to provide for the Relief of the Poor in extra-parochial Places," which enacts by sect. 9, that "Where any extra-parochial place has belonging to or

1 & 2 Vict.
c. 107.

Conversion of
chapel into
parish church.

20 Vict. c. 19.
Places extra-
parochial.

within it any church or chapel of the Church of England, the bishop of the diocese within which such church or chapel shall be locally situate may, if he think fit, authorize, by writing under his hand and seal, the publication of banns and the solemnization of marriage by banns or licence in such church or chapel of persons residing within such extra-parochial place, and such written authorization shall be registered in the registry of the diocese."

23 Vict. c. 24. 23 Vict. c. 24, reciting this act, enacts as follows:—
Sect. 1. "The authority given by the bishop in consequence of the said recited act for the publication of banns, and the solemnization of marriages by banns or licence in such church or chapel, shall be construed to extend to and authorize marriages in such churches or chapels between parties both or either of them being resident in such extra-parochial place, and all such marriages so had shall be deemed valid in like manner as if such extra-parochial place had been a parish: Provided that, when the parties to any marriage intended to be solemnized after publication of banns shall reside within different ecclesiastical districts, the banns for such marriage shall be published in the church or chapel authorized under the provisions of the recited act in which the marriage is intended to be celebrated, as well as in the chapel of the other district, licensed under the provisions of one of the statutes in such case made and provided, where one of the parties then is resident, and if there be no such chapel, then in the church or chapel in which the banns of such last-mentioned party might be legally published if no such statute had been passed."

Marriage in
ambassador's
chapel.

The marriage in an ambassador's house or chapel of a subject of the state which the ambassador represents is valid, but it is doubtful at least whether the privilege attached to ambassadors' chapels be available to parties both of whom belong to a different country from that of the ambassadors. In *Pertreis v. Tondear*, Lord Stowell said, "Taking the privilege to exist in Embassadors' chapels (which perhaps has not been formally decided), I may still deem it a fit subject for consideration whether such a privilege can protect a marriage where neither party, as far as appears at present, is of the country of the Ambassador, and where one of them has acquired a matrimonial domicile in this country, and where it is not shown that she had been living in a house entitled to privilege during her residence in England. On these grounds I shall admit the libel" (a). But no further proceedings were had in this case.

55 & 56 Vict.
c. 23.

The Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), provides as follows:

Validity of
marriages
solemnized

Sect. 1. "All marriages between parties of whom one at least is a British subject solemnized in the manner in this act pro-

(a) 1 Consist. p. 139. See also *Smith v. Ruding*, 2 Consist. p. 385; *Lloyd v. Petitjean*, 2 Curt. p. 251.

vided in any foreign country or place by or before a marriage officer within the meaning of this act shall be as valid in law as if the same had been solemnized in the United Kingdom with a due observance of all forms required by law.”

abroad in
manner pro-
vided by Act.

Sects. 2, 3, 4, 5, 6, and 7 provide for the procedure with a view to marriage, which is entirely civil and is therefore omitted here, and for the like consent “as is required by law to marriages solemnized in England.”

By sect. 8, “(1.) After the expiration of fourteen days after the notice of an intended marriage has been entered under this act, then, if no lawful impediment to the marriage is shown to the satisfaction of the marriage officer, and the marriage has not been forbidden in manner provided by this act, the marriage may be solemnized under this act.

Solemnization
of marriage
at office in
presence of
marriage
officer and
two witnesses.

(2.) Every such marriage shall be solemnized at the official house of the marriage officer, with open doors, between the hours of eight in the forenoon and three in the afternoon, in the presence of two or more witnesses, and may be solemnized by another person in the presence of the marriage officer, according to the rites of the Church of England, or such other form and ceremony as the parties thereto see fit to adopt, or may, where the parties so desire, be solemnized by the marriage officer.

(3.) Where such marriage is not solemnized according to the rites of the Church of England, then in some part of the ceremony, and in the presence of the marriage officer and witnesses, each of the parties shall declare,

“I solemnly declare, that I know not of any lawful impediment why I *A. B.* [*or C. D.*] may not be joined in matrimony to *C. D.* [*or A. B.*]”

And each of the parties shall say to the other,

“I call upon these persons here present to witness, that I *A. B.* [*or C. D.*] take thee, *C. D.* [*or A. B.*], to be my lawful wedded wife [*or husband*].”

Sects. 9 and 10 provide for fees and registration.

Sect. 11, “(1.) For the purposes of this act the following officers shall be marriage officers, that is to say:—

Marriage
officers and
their districts.

(a) Any officer authorized in that behalf by a Secretary of State by authority in writing under his hand (in this act referred to as a marriage warrant); and

(b) Any officer who, under the marriage regulations herein-after mentioned is authorized to act as marriage officer without any marriage warrant,

and the district of a marriage officer shall be the area within which the duties of his office are exerciseable, or any such less area as is assigned by the marriage warrant or any other warrant of a secretary of state, or is fixed by the marriage regulations.

(2.) Any marriage warrant of a Secretary of State may authorize to be a marriage officer—

(a) a British ambassador residing in a foreign country to the government of which he is accredited, and also any

officer prescribed as an officer for solemnizing marriages in the official house of such ambassador;

- (b) the holder of the office of British consul in any foreign country or place specified in the warrant; and
- (c) a governor, high commissioner, resident, consular or other officer, or any person appointed in pursuance of the marriage regulations to act in the place of a high commissioner or resident; and this act shall apply with the prescribed modifications to a marriage by or before a governor, high commissioner, resident, or officer so authorised by the warrant, and in such application shall not be limited to places outside her Majesty's dominions.

(3.) If a marriage warrant refers to the office without designating the name of any particular person holding the office, then, while the warrant is in force, the person for the time being holding or acting in such office shall be a marriage officer.

(4.) A Secretary of State may, by warrant under his hand, vary or revoke any marriage warrant previously issued under this act.

(5.) Where a marriage officer has no seal of his office, any reference in this act to the official seal shall be construed to refer to any seal ordinarily used by him, if authenticated by his signature with his official name and description."

Marriages on board her Majesty's ships on foreign stations.

Sect. 12. "A marriage under this act may be solemnized on board one of her Majesty's ships on a foreign station, and with respect to such marriage—

- (a) subject to the marriage regulations a marriage warrant of a Secretary of State may authorise the commanding officer of the ship to be a marriage officer;
- (b) the provisions of this act shall apply with the prescribed modifications."

Proof of formalities not necessary after marriage.

Sect. 13 provides, in analogy with the law of home marriages, against its being necessary to prove previous formalities or consent after a marriage has once been solemnized, or even the authority of the officer acting as marriage officer.

Penalties, &c.

Sect. 14 has the usual provision for forfeiture of property in case of a fraudulent marriage.

Sect. 15 provides punishment for a false oath or false notice.

Power to refuse solemnization of marriage inconsistent with international law.

Sect. 19. "A marriage officer shall not be required to solemnize a marriage, or to allow a marriage to be solemnized in his presence, if in his opinion the solemnization thereof would be inconsistent with international law or the comity of nations;

Provided that any person requiring his marriage to be solemnized shall, if the officer refuses to solemnize it or allow it to be solemnized in his presence, have the right of appeal to the Secretary of State given by this act."

By sect. 21, Large powers of making regulations are given to her Majesty in Council.

Validity of marriages solemnized

By sect. 22, "It is hereby declared that all marriages solemnized within the British lines by any chaplain or officer or

other person officiating under the orders of the commanding officer of a British army serving abroad, shall be as valid in law as if the same had been solemnized within the United Kingdom, with a due observance of all forms required by law.”

Sect. 23. “Nothing in this act shall confirm or impair or in anywise affect the validity in law of any marriage solemnized beyond the seas, otherwise than as herein provided, and this act shall not extend to the marriage of any of the Royal family.”

Marriages celebrated since the year 1836 in a registered building or at the office of the registrar have been already mentioned (*b*). With such marriages the church and the clergyman have no concern.

It has happened, however, that persons so married before the registrar have desired to be afterwards married, and have been married in church, independently of the provisions of 19 & 20 Vict. c. 119, s. 12. So it happened with respect to what were called Gretna Green marriages, a particular form of licence being framed to meet the exigencies of such a case. Lord Chancellor Eldon was twice married in Scotland and England to the same person. The maiden name of the wife was used on the second occasion; and when a ward of chancery has been married clandestinely and the Court directs a second marriage, the maiden name of the lady is always used (*c*).

The church has had regulations with respect to the times of year at which marriage should be solemnized, not indeed invalidating marriages solemnized at other times, but subjecting the minister and the parties, in the absence of a proper faculty, to ecclesiastical censures; though there seem to be no prohibitions expressed or plainly supposed in our constitutions or canons. But there is a place in Lindwood, which not only implies a prohibition of times in general, but expressly mentions the times prohibited: which is, that the solemnization of marriage cannot be from the first Sunday in Advent until the Octave of Epiphany exclusive; and from Septuagesima Sunday to the first Sunday after Easter inclusive: and from the first Rogation day until the seventh day after Pentecost inclusive; although marriage may be contracted within these times (*d*).

It is also certain, that a distinction of times has been observed as the law of our Reformed Church, not only from the clause which we may observe in several licences in our books, *quocunque anni tempore*, but also from a remarkable dispute which happened in Archbishop Parker's time, between the master of the faculties and the vicar-general, whether the first only, or the second in conjunction with him, had a right to grant licences on that particular head (*e*).

(*b*) Supra, sect. 8.

(*c*) *Piers v. Piers* (A.D. 1849), 2 H. L. pp. 354, 355; remarks of Lord Campbell and Lord Chancellor Cottenham; see also the copy of the

extract from the parish register as to Lord Eldon's marriage.

(*d*) Gibs. p. 430; Lindw. p. 274; Ayl. Par. p. 364.

(*e*) Gibs. p. 430.

within British lines.

Saving.

Before registrar or in registered building.

Subsequent ceremony in church.

Unseasonable times of the year.

And after that, in Archbishop Whitgift's table of fees there is first a fee for a licence to solemnize matrimony without banns, and afterwards a fee for a licence to solemnize matrimony in the time of prohibition of banns to be published.

Which point is further confirmed by the attempts that have been made in parliament and convocation to take away that distinction of times. In parliament, in the 17th of Elizabeth, a bill was depending, intituled "An Act declaring Marriages lawful at all Times;" and in convocation, in the year 1575, the last of the articles presented to the queen for confirmation (but by her rejected) was, that the bishops shall take order, that it be published and declared in every parish church within their diocese before the first day of May next coming, that marriage may be solemnized at all times of the year. This went further than what had been projected upon that head in the year 1562, when the scheme intended to be offered to the parliament or convocation, or both, was, that it shall be lawful to marry at any time of the year without dispensation, except it be upon Christmas Day, Easter Day, and six days going before, and upon Whitsunday (f).

Canon 62.
Unseasonable
times of the
day.

By Canon 62 of 1603 already referred to, which inflicts the pain of suspension for three years on a minister who marries persons without banns or licence, it was further provided as follows:

"Neither shall any minister upon the like pain, under any pretence whatsoever, join any persons so licensed in marriage at any unseasonable times, but only between the hours of eight and twelve in the forenoon, . . . and likewise in the time of divine service."

The new canons of 1888 repeal these words, and are as follows:—

Canon of 1888.

1. "No minister shall celebrate matrimony betwixt any persons otherwise than between the hours of eight in the forenoon and three in the afternoon. It shall not be necessary that such celebration of matrimony shall take place in time of divine service."

2. "All licences henceforth granted for celebration of matrimony betwixt any parties without publication of banns shall contain the condition that the said matrimony shall be celebrated between the hours of eight in the forenoon and three in the afternoon."

4 Geo. 4, c. 76,
s. 21.

By 4 Geo. 4, c. 76, s. 21, it was made felony to solemnize marriage "at any other time than between the hours of *eight and twelve in the forenoon*" unless by special licence.

49 & 50 Vict.
c. 14.

Now, however, by 49 & 50 Vict. c. 14, s. 1, marriages may be "between the hours of eight in the forenoon and three in the afternoon."

And s. 2 substitutes the words "eight in the forenoon and three in the afternoon" for those above in italics; and provides

that no person shall be subject to any proceedings in any Court, ecclesiastical or temporal, for solemnizing marriage between those hours.

By 4 Geo. 4, c. 76, s. 28, marriage must be solemnized in the presence of two witnesses besides the clergyman. Witnesses.

By 6 & 7 Will. 4, c. 86, s. 31, the entry in the register book is to be attested by the parties married, the clergyman and two witnesses.

By the rubric, At the time of the celebration of the marriage, the minister, after reciting the causes for which matrimony was ordained, shall say, "Therefore if any man can show any just cause why they may not lawfully be joined together, let him now speak, or else hereafter for ever hold his peace." Impediments alleged.

"And also speaking unto the persons that shall be married, he shall say,—'I require and charge you both, as ye will answer at the dreadful day of judgment, when the secrets of all hearts shall be disclosed, that if either of you know any impediment why you may not be lawfully joined together in matrimony, ye do now confess it. For be ye well assured, that so many as are coupled together otherwise than God's word doth allow, are not joined together by God, neither is their matrimony lawful.'

"At which day of marriage, if any man do allege and declare any impediment why they may not be coupled together in matrimony by God's law, or the laws of this realm; and will be bound, and sufficient sureties with him to the parties, or else put in a caution (to the full value of such charges as the persons to be married do thereby sustain) to prove his allegation; then the solemnization must be deferred until such time as the truth be tried."

"If no impediment be alleged," then the marriage shall go on; and after the parties have declared their mutual assent, and have taken each other in marriage according to the form prescribed, then "the man shall give unto the woman a ring, laying the same upon the book, with the accustomed duty to the priest and clerk. And the priest taking the ring, shall deliver it unto the man to put it on the fourth finger of the woman's left hand; and the man holding the ring there, and taught by the priest, shall say, 'With this ring I thee wed, with my body I thee worship, and with all my worldly goods I thee endow'" Ring.

Which last words are best explained by the rubric of the Prayer Book of the 2 Edw. 6, which was thus: "The man shall give unto the woman a ring, and other tokens of spousage, as gold or silver, laying the same upon the book. . . . And the man, taught by the priest, shall say, With this ring I thee wed, this gold and silver I thee give;" and then these other words, "with all my worldly goods I thee endow," were delivered with a more peculiar significancy.

"The first ring" (according to Swinburne) "was not of gold but of iron, adorned with an adamant;" the metal hard and durable, signifying the durance and perpetuity of the contract,

"Howbeit" (he says) "it skilleth not at this day what metal the ring be; the form of the ring being circular, that is, round and without end, importeth thus much, that their mutual love and hearty affection should roundly flow from the one to the other as in a circle, and that continually, and for ever. The finger on which this ring is to be worn is the fourth finger of the left hand, next unto the little finger," because there was supposed a vein of blood to pass from thence unto the heart (*g*).

In the Roman ritual, there is a benediction of the ring, and a prayer that she who wears it may continue in perfect love and fidelity to her husband, and in the fear of God all her days.

Holy com-
munion.

By the rubrics of the Prayer Books of the 2nd and of the 5th years of Edw. 6, the new married persons were required on the same day of their marriage to receive the holy communion.

But by the present rubric, it is only declared to be convenient that the new-married persons should receive the holy communion at the time of their marriage, or at the first opportunity afterwards.

Sermon.

By the rubrics of the Prayer Books of the 2nd and of the 5th years of Edw. 6, after the gospel was to be a sermon, wherein ordinarily the office of a man and wife should be declared, according to Holy Scripture; or if there were no sermon, then the minister was to read several sentences out of Scripture, setting forth the said duties.

And by the present rubric, if there be no sermon declaring the duties of man and wife, then the minister shall read the same sentences as aforesaid.

Fee for
marriage.

With respect to the fee for marriage, an old provincial constitution enacts, "We do firmly enjoin that neither burial nor baptism nor any sacrament of the church shall be denied to any one upon the account of any sum of money, nor shall matrimony be hindered therefore; because if anything hath been accustomed to be given by the pious devotion of the faithful, we will that justice be done thereupon to the churches by the ordinary of the place afterwards" (*h*).

That no Sacrament of the Church.—Which were seven; of which matrimony was one.

Shall be denied.—Or delayed.

Upon the Account of any Sum of Money.—That is, used to be paid or taken in the administration of any of the sacraments.

Nor shall Matrimony be hindered therefore.—But by the rubric in the office of matrimony, at the time of delivering the ring, the man shall also then lay down the accustomed duty to the priest and clerk. Which if he shall refuse to do, whether the minister is bound to proceed nevertheless doth not appear from any rubric or canon.

(*g*) Swinburne, Treatise of Spousals or Matrimonial Contracts, sect. 15.

(*h*) Lind. p. 278; Vide supra, p. 508, n. (*s*), where this constitution is given in the original Latin.

Hath been accustomed to be given.—That is, of old, and for so long time as will create a prescription, although at first given voluntarily. For they who have paid so long are presumed at first to have bound themselves voluntarily thereunto (i).

And this, it is said, is recoverable by law, in such places and cases only where there is a custom for the payment thereof upon performance of the duty (k).

Mr. Johnson says, it was an ancient custom that marriage should be performed in no other church but that to which the woman belonged as a parishioner; and therefore to this day, the ecclesiastical law allowed a fee due to the curate of that church, whether she were married there or not. And this fee was expressly reserved for him by the words of the licence, according to the old form, which was not then disused in all dioceses. But it is said that judgment has been otherwise given in the temporal courts (l).

Whether fee due to the curate of the parish to which the wife belonged.

So in the case of *Thompson v. Davenport*, in 13 Will. 3, the plaintiff libelled against the defendant, setting forth a custom in the parish of Ellington, in Derbyshire, that of every woman who is a parishioner, and dwells there, and marries with a licence, the husband at the time of the marriage, or soon after, shall pay to the vicar five shillings as an accustomed fee; and so brought his case within that custom; the defendant suggested for a prohibition that all customs are triable at common law, and that the plaintiff had libelled against him, setting forth the custom as aforesaid. And a prohibition was granted (m).

And in the case of *Patten v. Castleman* (n), Sir G. Lee rejected the claim of a vicar to a fee from one of his parishioners, married in the church of another parish. He said, citing *Lindwood* (o), that anciently no fee was demandable for marriage, and that though it might legally be due by custom, the custom must not be unreasonable, as it would be if a fee could be due where no service was done. See the common law authorities cited in the same very learned judgment.

No fee where no service.

And Sir William Blackstone says, of common right no fee is due to the minister for performing such like branches of his duty, and it can only be supported by special custom; but no custom can support the demand of a fee without performing them at all (p).

In the case of *Bryant v. Foot* (q), the Queen's Bench, and the Court of Exchequer Chamber on appeal, held that a marriage fee of 13s., of which 10s. was for the rector, and 3s. for the

Unreasonable custom.

(i) Lind. p. 279.

(k) Bohun, Law of Tithes, pp. 144, 145.

(l) Johns. pp. 188, 189.

(m) Lutw. p. 1059.

(n) 1 Lee, p. 387.

(o) Lind. p. 185, c. "Quia qui-

dam."

(p) 3 Black. Comm. p. 90; *Bp. of St. Davids v. Lucy*, 1 Ld. Raym. p. 450; *Naylor v. Scott*, 2 Ld. Raym. p. 1558; 1 Barn. K. B. p. 159.

(q) L. R. 2 Q. B. p. 161; L. R. 3 Q. B. p. 497.

clerk, was unreasonable on account of its large amount, and could not be presumed to date from time immemorial.

6 & 7 Will. 4,
c. 85.

Fees on
marriages
in licensed
chapels.

As to the appropriation of fees on marriages performed in chapels licensed by the bishop, sect. 27 of 6 & 7 Will. 4, c. 85, enacts, that "All fees, dues and other emoluments on account of the solemnization of marriages which belong to the incumbent or clerk respectively of any church or chapel in any parish or district within which the solemnization of marriages shall be authorized as aforesaid shall respectively be received, until the avoidance of such church or chapel next after the passing of this act, for and on account of such incumbent, and until the vacancy in the office of clerk next after the passing of this act, for and on account of such clerk, and be paid over to them, except such portion of the fees, dues or other emoluments as the said bishop of the diocese, with the consent of the said incumbent and clerk respectively, shall in such aforesaid licence assign to the minister and clerk respectively of the chapel in which the solemnization of marriages shall be authorized as aforesaid; and it shall be lawful for the said bishop in and by such licence, without any such consent, to declare that from and after such next avoidance or vacancy respectively the whole or such part of the fees, dues and other emoluments on account of the solemnization of marriages in such last-mentioned chapel as shall be specified in such licence, shall be receivable, and the same shall thenceforth be received by or for the minister and clerk of such chapel respectively."

Saving of
right to
receive fees.

By 6 & 7 Will. 4, c. 86, s. 49, it is enacted that "Nothing herein contained shall affect . . . the right of any officiating minister to receive the fees now usually paid for the performance or registration of any . . . marriage."

The various church building and new parishes acts provide for the way in which the fees on marriages in cases coming under their operation are to be distributed (*r*).

Registration.

The act for registering births, deaths and marriages in England, 6 & 7 Will. 4, c. 86, enacts as follows:—

6 & 7 Will. 4,
c. 86.

Register
books to be
provided.

Sect. 17. "The registrar general shall cause to be printed on account of the said register office a sufficient number of register books for making entries of all . . . marriages of his majesty's subjects in England, according to the forms of schedule . . . (C.) to this act annexed; and the said register books shall be of durable materials, and in them shall be printed upon each side of every leaf the heads of information herein required to be known and registered of . . . marriages respectively: and every page of each of such books shall be numbered progressively from the beginning to the end, beginning with number one; and every place of entry shall be also numbered progressively from the beginning to the end of the book, beginning with number one; and every entry shall be divided from the following entry by a printed line."

And by sect. 30, "The registrar general shall furnish or cause to be furnished to the rector, vicar, or curate of every church and chapel in England wherein marriages may lawfully be solemnized, . . . a sufficient number in duplicate of marriage register books, and forms for certified copies thereof, as hereinafter provided." . . .

Marriage register books to be provided.

Schedule (C.) of the statute gives the form as follows:—

"1836.—Marriages solemnized at the parish church in the parish of *Mary-le-bone*, in the county of *Middlesex*.

No.	When married.	Name and Surname.	Age.	Con- dition.	Rank or Profes- sion.	Residence at the Time of Marriage.	Father's Name and Surname.	Rank or Profession of Father.
1	17 March, 1836.	<i>William Hastings.</i>	<i>Of full Age.</i>	<i>Bachelor.</i>	<i>Carpenter.</i>	<i>3, South Street.</i>	<i>Peter Hastings.</i>	<i>Upholsterer.</i>
		<i>Sophia Ann Mitchell.</i>	<i>Minor.</i>	<i>Spinster.</i>	—	<i>17, High Street.</i>	<i>Geoffrey Mitchell.</i>	<i>Butcher.</i>

Married in the parish church according to the rites and ceremonies of the *Established Church*, by licence, or after banns, by me,

James Hollingshead, Vicar.

This marriage was solemnized { *William Hastings,* } in the presence { *John Hastings,*
between us, { *Sophia Ann Mitchell,* } of us, { *Geoffrey Mitchell.*

The words and figures in *Italics* in this schedule to be filled in as the case may be."

Sect. 31. "Every clergyman of the Church of England, immediately after every office of matrimony solemnized by him, shall register in duplicate in two of the marriage register books the several particulars relating to that marriage according to the form of the said schedule (C.); . . . and every such entry as hereinbefore is mentioned . . . shall be signed by the clergyman . . . and by the parties married, and by two witnesses, and shall be made in order from the beginning to the end of each book, and the number of the place of entry in each duplicate marriage register book shall be the same."

Marriage registers to be kept in duplicate.

Sect. 33. "The rector, vicar, or curate of every such church and chapel . . . shall, in the months of April, July, October, and January respectively, make and deliver to the superintendent registrar of the district in which such church or chapel may be situated, . . . on durable materials, a true copy certified by him under his hand of all the entries of marriages in the register book kept by him since the last certificate, the first of such certificates to be given in the month of July, 1837, and to contain all the entries made up to that time, and if there shall have been no marriage entered therein since the last certificate, shall certify the fact under his hand, and shall keep the said marriage register books safely until the same shall be filled;

Duplicates and certified copies of registers of marriages to be sent to superintendent registrar.

and one copy of every such register book, when filled, shall be delivered to the superintendent registrar of the district in which such church or chapel may be situated, . . . and the other copy of every such register book kept by any such rector, vicar, or curate shall remain in the keeping of such rector, vicar, or curate, and shall be kept by him with the registers of baptism and burials of the parish or chapelry within which the marriages registered therein shall have been solemnized." . . .

1 Vict. c. 22.

Clergymen
to be paid
for making
register in
duplicate.

And 1 Vict. c. 22, provides by sect. 27, that "the said superintendent registrar shall pay or cause to be paid to the said rector, vicar, or curate, the sum of sixpence for every entry contained in such certified copy, which sum shall be reimbursed to the said superintendent registrar by the guardians or overseers of the union, parish, or place for which he shall be appointed superintendent registrar as aforesaid, in like manner as by the said act is provided for the payment of the registrar, on production of his accounts to the superintendent registrar."

6 & 7 Will. 4,
c. 86.

Searches may
be made, and
certificates
given by the
persons
keeping the
registers.

By 6 & 7 Will. 4 c. 86, s. 35, "Every rector, vicar, or curate, . . . who shall have the keeping for the time being of any register book of . . . marriages, shall at all reasonable times allow searches to be made of any register book in his keeping, and shall give a copy certified under his hand of any entry or entries in the same on payment of the fee hereinafter mentioned; (that is to say,) for every search extending over a period not more than one year the sum of one shilling, and sixpence additional for every additional year, and the sum of two shillings and sixpence for every single certificate."

Power to
make inqui-
ries for correct
entry.

And in order to enable the clergyman to make correct entries, sect. 40 enacts—"That it shall be lawful for every clergyman of the Church of England who shall solemnize any marriage in England . . . to ask the parties married the several particulars herein required to be registered touching such marriage."

Sect. 41. "That every person who shall wilfully make or cause to be made, for the purpose of being inserted in any register of . . . marriage, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty of perjury."

Penalty for
not duly
registering
marriages, or
for losing or
injuring the
registers.

Sect. 42. "Every person who shall refuse or without reasonable cause omit to register any marriage solemnized by him, or which he ought to register, . . . and every person having the custody of any register book, or certified copy thereof or of any part thereof, who shall carelessly lose or injure the same, or carelessly allow the same to be injured whilst in his keeping, shall forfeit a sum not exceeding fifty pounds for every such offence."

The provisions of the law making forgery of the register books felony have been already mentioned (s).

By 6 & 7 Will. 4, c. 86, s. 44, however, "No person charged with the duty of registering any . . . marriage, who shall discover any error to have been committed in the form or substance of any such entry, shall be therefore liable to any of the penalties aforesaid if within one calendar month next after the discovery of such error, in the presence of . . . the parties married, . . . or in case of the death or absence of the respective parties aforesaid, then in the presence of the superintendent registrar and of two other credible witnesses who shall respectively attest the same, he shall correct the erroneous entry, according to the truth of the case, by entry in the margin, without any alteration of the original entry, and shall sign the marginal entry, and add thereunto the day of the month and year when such correction shall be made: Provided also, that in the case of a marriage register he shall make the like marginal entry, attested in like manner, in the duplicate marriage register book to be made by him as aforesaid, and in every case shall make the like alteration in the certified copy of the register book to be made by him as aforesaid, or in case such certified copy shall have been already made, provided he shall make and deliver in like manner a separate certified copy of the original erroneous entry, and of the marginal correction therein made."

Accidental errors may be corrected.

It is provided by 1 Vict. c. 22, s. 28, that the penalty for neglecting to transmit certified copies of register books to the superintendent registrar shall be 10*l*.

Neglect to transmit copies, &c.

A doubt has been made, in what manner a marriage celebrated by virtue of a special licence from the Archbishop of Canterbury shall be registered, especially where the marriage is solemnized in a private house, and by a clergyman not being the incumbent of the parish, and the incumbent refuses to permit the same to be entered in the parish register. But the doubt seems to be solved by the words of the act itself:—"The register book of marriages is of the goods of the parish, and consequently the churchwardens (and not the minister) ought to have the keeping thereof; and the act says, all marriages celebrated in any church or chapel or within any such parish or chapelry, shall be entered in such register; and therefore if the churchwardens shall refuse to produce the register book for that purpose, they may be compelled thereunto by legal process; for where a thing by any act of parliament is required to be done, that also is required without which the thing itself cannot be.

Register of special licence.

Another doubt has been made, by what name the wife shall subscribe the register, whether by the name which she had before marriage, or by the newly-acquired name of her husband. In Scotland, the wife retains the name which she had before marriage, but in England the case is otherwise; for by the marriage she loses her former name, and legally receives the name of her husband. As appears from a pretty strong case, that of *Bon v. Smith*, in 38 Eliz. A man had issue a son and a daughter, and devised his land to his son in tail, and if he died

Wife's signature.

without issue, that it should remain to the next of his name,—and died. The son died without issue; the daughter being then married, the question was, whether she should have this land. And it was holden by the Court, that she should not, for she had lost her name by her marriage, but it should go to the next heir male of the name, but if she had not been married at the time of her brother's death, she should have had it, for she was the next of the name (*t*).

—◆—

SECT. 10.—*Marriages when Void—Divorce.*

Matrimonial
jurisdiction.

Till the passing of the 20 & 21 Vict. c. 85, the ecclesiastical courts had jurisdiction in all cases of marriages. By that act, however, the jurisdiction in all matters matrimonial was taken from them, and vested in the Court of Divorce and Matrimonial Causes. By the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93), power is given to this court to declare, on a petition filed for that purpose, that a person is legitimate, or that a marriage is or was valid. This court is now merged in the High Court of Justice.

The ecclesiastical courts used to have also jurisdiction in cases of general bastardy which was to be tried by the bishop's certificate. It seems, however, most probable that this would be holden to be one of the "matters matrimonial" over which the ecclesiastical courts have now no jurisdiction (*u*).

Presumption
in favour of
marriage.

The law always presumes in favour of the validity of a marriage.

In *Piers v. Piers* (*x*) the House of Lords said, that the question of the validity of a marriage cannot be tried like any other question of fact which is independent of presumption, for the law will presume in favour of marriage.

There is a strong legal presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof.

Where, therefore, two persons had shown a distinct intention to marry, and a marriage had been, in form, celebrated between them, by a regularly ordained clergyman, in a private house, as if by special licence, and the parties, by their acts at the time, showed that they believed such marriage to be a real and valid marriage, the rule of presumption was applied in favour of its validity, though no licence could be found nor any entry of the granting of it, or of the marriage itself, could be discovered;

(*t*) Cro. Eliz. p. 532.

(*u*) See Stephen's Comm. (ed. 1858), vol. iii. p. 586.

(*x*) 2 H. L. p. 331. See also the judgment of Lord Ellenborough and the King's Bench in *Rex v. Brampton*, 10 East, p. 282.

and though the bishop of the diocese (during whose episcopacy the matter occurred), when examined many years afterwards on the subject, deposed to his belief that he had never granted any licence for such marriage.

With respect to marriages illegally solemnized without fraud in a church not licensed for the celebration of marriage, 14 & 15 Vict. c. 97, enacts as follows:—

Sect. 25. "Where by error, and without any fraud, banns of matrimony have been published or marriages solemnized in the church of any parish or district in which church banns could not legally be published nor marriages legally solemnized, the banns of matrimony already published and marriages already solemnized in such church as aforesaid shall not, except where any action, suit, or other proceeding in relation to the validity of any such marriage was pending on the nineteenth day of June, 1851, be questioned on account of the said banns having been published or the said marriages solemnized in any such church as aforesaid . . . ; and the registers of all marriages so solemnized as aforesaid, except as aforesaid, or copies of such registers, shall be received in all courts of law and equity as evidence of such marriages respectively."

14 & 15 Vict.
c. 97.

Marriages before June 19, 1851, in churches and chapels not licensed for marriages, good.

And 24 & 25 Vict. c. 16, provides by sect. 4, "Whereas by error banns have been published and marriages have been solemnized in churches and chapels duly consecrated, but in which churches or chapels banns cannot be legally published nor marriages by law be solemnized, and it is expedient to remove all doubt arising from the circumstances aforesaid touching the publications of such banns and the validity of such marriages: Be it therefore enacted, that all banns already published and all marriages already solemnized in such churches and chapels as aforesaid shall not hereafter be questioned on account of the said banns having been published or the said marriages solemnized in a church or chapel not legally authorized for the publication of banns and solemnization of marriages; and the minister or ministers who solemnized the same shall not be liable to any ecclesiastical censures or to any proceedings or penalties by reason thereof, Provided he or they be rightly ordained; and the registers of all marriages so solemnized as aforesaid, or copies of such registers, shall be received in all courts of law and equity as evidence of such marriages respectively."

24 & 25 Vict.
c. 16.

The like provision.

This is followed by a proviso that no authorization is given for future publication of banns or solemnization of marriages in such churches or chapels.

A marriage, so far as the church is concerned, is absolutely void in the following cases by 4 Geo. 4, c. 76, s. 22: "If any person shall knowingly and wilfully intermarry in any other place than a church, or such public chapel wherein banns may be lawfully published, unless by special licence as aforesaid, or shall knowingly and wilfully intermarry without due publication

4 Geo. 4, c. 76.

Marriage to be void where persons wilfully marry in any other place than at

church, &c.,
or without
banns or
licence.

of banns, or licence from a person or persons having authority to grant the same, first had and obtained, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void to all intents and purposes whatsoever."

6 & 7 Will. 4,
c. 85.

Marriages
void if unduly
solemnized
with the
knowledge of
both parties.

And, so far as the law of the state apart from the church is concerned, the statute 6 & 7 Will. 4, c. 85, enacts, by sect. 42, "That if any persons shall knowingly and wilfully intermarry under the provisions of this act in any place other than the church, chapel, registered building, or office or other place specified in the notice and certificate as aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without licence, in case a licence is necessary under this act, or in the absence of a registrar or superintendent registrar where the presence of a registrar or superintendent registrar is necessary under this act, the marriage of such persons, except in any case hereinafter excepted, shall be null and void: provided always, that nothing herein contained shall extend to annul any marriage legally solemnized according to the provisions of 4 Geo. 4, c. 76."

According to both statutes both parties to the marriage must knowingly and wilfully intermarry in defiance of these provisions.

Divorce.

The necessity of procuring an act of parliament for a divorce in each separate case proved that the common law of England did not allow married persons to be divorced, but treated the marriage bond as indissoluble. A separation *à mensâ et thoro* was granted for certain causes by the ecclesiastical courts. The matter is regulated by the following canons of 1603:—

Canon 105.

Can. 105. "Forasmuch as matrimonial causes have been always reckoned and reputed among the weightiest, and therefore require the greater caution when they come to be handled and debated in judgment, especially in causes wherein matrimony having been in the church duly solemnized, is required, upon any suggestion or pretext whatsoever, to be dissolved or annulled; we do straitly charge and enjoin that in all proceedings to divorce and nullities of matrimony, good circumspection and advice be used, and that the truth may (as far as is possible) be sifted out by the deposition of witnesses and other lawful proofs and evictions; and that credit be not given to the sole confession of the parties themselves, howsoever taken upon oath either within or without the court."

Canon 106.

Can. 106. "No sentence shall be given either for separation *à thoro et mensâ* or for annulling of pretended matrimony, but in open court and in the seat of justice; and that with the knowledge and consent either of the archbishop within his province, or of the bishop within his diocese, or of the dean of the arches, the judge of the audience of Canterbury, or of the vicars-general, or other principal officials, or *sede vacante* of the

guardians of the spiritualities, or other ordinaries to whom of right it appertaineth, in their several jurisdictions and courts and concerning them only that are then dwelling under their jurisdictions."

Can. 107. "In all sentences pronounced only for divorce and separation *à thoro et mensâ*, there shall be a caution and restraint inserted in the act of the said sentence that the parties so separated shall live chastely and continently; neither shall they, during each other's life, contract matrimony with any other person. And for the better observation of this last clause, the said sentences of divorce shall not be pronounced until the party or parties requiring the same have given good and sufficient caution and security into the court, that they will not in any way break or transgress the said restraint or prohibition." Canon 107.

Can. 108. "And if any judge, giving sentence of divorce or separation, shall not fully keep and observe the premisses, he shall be, by the archbishop of the province or by the bishop of the diocese, suspended from the exercise of his office for the space of a whole year; and the sentence of separation, so given contrary to the form aforesaid, shall be held void to all intents and purposes of the law, as if it had not at all been given or pronounced." Canon 108.

About a century and a half after the Reformation a practice crept in of setting aside the law and of allowing the marriage bond to be dissolved, *causâ adulterii*, by a separate act of parliament in each particular case. This practice has been well characterized by Sir J. Mackintosh. He calls it "a rude and most inconvenient expedient, which subjects proceedings which ought to be judicial to the temper of numerous and open assemblies, while, by its expense, it excludes the vast majority of men from the relief which, by long usage, it may be considered as permanently holding out to suitors who are not themselves uncommonly faulty (*y*). . . . It must be admitted, that the intrinsic difficulties of the subject are exceedingly great. The dangerous extremes are, absolute and universal indissolubility, which has been found to be productive of a general connivance at infidelity, and consequently of a general dissolution of manners on the one hand, and on the other, of a considerable facility of divorce in cases very difficult to be defined—a practice, to say nothing of

Private acts
of parliament.

(*y*) "Other legislators (says Mr. Burke) knowing that marriage is the origin of all relations, and consequently the first element of all duties, have endeavoured by every act to make it sacred. The Christian religion, by confining it to the pairs, and by rendering that relation indissoluble, has by these two things done more towards the peace, happiness, settlement, and civilization of the world than by any other part

in this whole scheme of divine wisdom."—*Letters on a Regicidal Peace*, Burke's Works vol. v.

See Hume's remarks in his Essay on Polygamy and Divorces;—those of Paley on the latter subject (*Principles of Moral and Political Philosophy*, bk. iii. pt. iii. ch. vii.; Works vol. iv.);—and the observations of Lord Stowell in *Evans v. Evans*, 1 Consist. p. 118; see also Conc. Trid. Sess. 24, Can. 7, 8.

other evil consequences, which would be at variance with the institution of marriage, intended chiefly to protect children from the inconstancy of parents, and next to guard women against the inconstancy of husbands, who, if divorce were procurable for any but clearly defined and most satisfactorily proved facts, would be enabled, as soon as they were tired of their wives, to make the situation of the helpless female so uneasy, that they must consent to divorce. To make the dissolution of marriage in the proper case alike accessible to all, is one of the objects to which, in great cities, and in highly civilized countries, it is hardest to point out a safe road" (z).

Divorce by
20 & 21 Vict.
c. 85.

In the year 1857 the statute 20 & 21 Vict. c. 85, conferred, for the first time, upon a court of justice a jurisdiction to grant divorces *à vinculo matrimonii*. The same statute took away from the ecclesiastical tribunals all civil (a) jurisdiction over the subject of marriage and its incidents.

Provision for
clergyman
refusing to
marry.

The legislature provided in a very singular manner for the case of a clergyman conscientiously refusing to marry a person whose former marriage had been dissolved by reason of his or her adultery.

The sections of the statute on this point are as follows:—

Sect. 57. "When the time limited for appealing against any decree dissolving a marriage shall have expired, and no appeal shall have been presented against such decree, or when any such appeal shall have been dismissed, or when in the result of any appeal any marriage shall be declared to be dissolved, but not sooner, it shall be lawful for the respective parties thereto to marry again, as if the prior marriage had been dissolved by death: Provided always, that no clergyman in holy orders of the united Church of England and Ireland shall be compelled to solemnize the marriage of any person whose former marriage may have been dissolved on the ground of his or her adultery, or shall be liable to any suit, penalty, or censure for solemnizing or refusing to solemnize the marriage of any such person."

Sect. 58. "Provided always, that when any minister of any church or chapel of the united Church of England and Ireland shall refuse to perform such marriage service between any persons who but for such refusal would be entitled to have the same service performed in such church or chapel, such minister shall permit any other minister in holy orders of the said united church, entitled to officiate within the diocese in which such church or chapel is situate, to perform such marriage service in such church or chapel."

Time before
new mar-
riage.

It has been ruled that where, after a decree of dissolution of marriage, one of the parties to such marriage was married in fact within the time limited by 20 & 21 Vict. c. 85, s. 57, and

(z) Mackintosh, History of England, vol. ii. p. 276.

(a) As to criminal jurisdiction, see *Ray v. Sherwood*, 1 Curt. pp.

198, 199; 1 Moo. P. C. C. p. 353; supra, p. 577; and *Mordaunt v. Moncrieffe*, L. R. 2 H. L. (Sc. & D.), p. 374.

during the lifetime of the other party to the marriage, the latter *de facto* marriage was null and void in law (*b*).

SECT. 11.—*Statutes as to the Celebration of Marriage.*

The following is believed to be a correct list of the statutes now in force for—(A.) regulating the celebration of marriage—(B.) confirming marriages which through some defect in the celebration might be void.

(A.)

4 Geo. 4, c. 76 . . .	General Act.
5 Geo. 4, c. 32 . . .	Churches under Repair.
6 & 7 Will. 4, c. 85 . . }	Marriage before Registrar (<i>c</i>).
1 Vict. c. 22 . . .	
3 & 4 Vict. c. 72 . . }	
7 & 8 Vict. c. 56 . . .	District Churches (<i>d</i>).
c. 81 (<i>e</i>) . . .	Ireland.
9 & 10 Vict. c. 72 . . }	
19 & 20 Vict. c. 96 . . .	Scotland.
c. 119 . . .	Marriage before Registrar.
20 Vict. c. 19 . . .	Extra-Parochial Places.
23 & 24 Vict. c. 18 . . .	Quakers.
c. 24 . . .	Extra-Parochial Places.
28 & 29 Vict. c. 64 . . .	Colonies.
33 & 34 Vict. c. 110 . . .	Ireland.
35 & 36 Vict. c. 10 . . .	Quakers.
36 & 37 Vict. c. 16 . . .	Ireland.
49 & 50 Vict. c. 14 . . .	Hours for Solemnization.
53 & 54 Vict. c. 47 . . .	Marriages Abroad.
55 & 56 Vict. c. 23 . . .	Foreign Countries (<i>f</i>).

(B.)

21 Geo. 3, c. 53 . . .	Certain Public Chapels.
44 Geo. 3, c. 77 . . .	
48 Geo. 3, c. 127 . . .	
58 Geo. 3, c. 84 . . .	India.
3 Geo. 4, c. 75 . . .	Marriages under Licences issued without
4 Geo. 4, c. 5 . . .	
5 Geo. 4, c. 68 . . .	Consent of Parents, &c.
6 Geo. 4, c. 92 . . .	Newfoundland.
	Churches and Chapels built since 26
	Geo. 2, c. 33.
11 Geo. 4 & 1 Will. 4, }	Temporary Churches and certain Chapels.
c. 18 }	
3 & 4 Will. 4, c. 45 . .	Hamburgh.

(*b*) *Chichester v. Mure* (f. c. *Chichester*) (1863), 3 Sw. & Tr. p. 223.

(*c*) The two first of these acts also contain the provisions for licensing chapels by the bishop for marriages. Vide *supra*, pp. 590, 591.

(*d*) Besides the various provisions in the several Church Building and New Parishes Acts as to marriages. Vide *supra*, pp. 593—599

(*e*) On this act a remarkable decision, having regard to the disestablishment of the Irish Church, long subsequent to the date of the act, was given by the Irish Queen's Bench Division, in *Regina v. Magee*, Feb. 17, 1893.

(*f*) The former acts now repealed will be found given at p. 621.

6 & 7 Will. 4, c. 24 . .	Wandsworth.
c. 92 . .	St. Clement, Oxford.
5 & 6 Vict. c. 113 . .	} Ireland.
6 & 7 Vict. c. 39 . .	
10 & 11 Vict. c. 58 . .	Quakers and Jews.
12 & 13 Vict. c. 68 . .	Foreign Countries.
c. 79 . .	New Zealand.
13 & 14 Vict. c. 38 . .	Upton cum Chalvey.
14 & 15 Vict. c. 97 . .	Churches and Chapels not licensed.
16 & 17 Vict. c. 122 . .	Trinity Church, Hulme.
17 & 18 Vict. c. 88 . .	Mexico.
18 & 19 Vict. c. 66 . .	Christ Church, Todmorden.
c. 81 . .	Certain Registered Buildings.
19 & 20 Vict. c. 70 . .	Coatham Church.
20 & 21 Vict. c. 29 . .	Christ Church, West Hartlepool.
21 & 22 Vict. c. 46 . .	Moscow. Tahiti. Ningpo.
22 Vict. c. 24	St. James, Baldersby. Topcliffe.
22 & 23 Vict. c. 64 . .	Lisbon.
23 & 24 Vict. c. 1 . .	St. Mary, Rydal.
24 & 25 Vict. c. 16 . .	Trinity Church, Rainow; and Chapels not licensed.
27 & 28 Vict. c. 77 . .	Ionian Islands.
28 & 29 Vict. c. 81 . .	St. James, Eastbury.
30 & 31 Vict. c. 2 . .	Odessa.
c. 93 . .	Morro Velho.
31 & 32 Vict. c. 23 . .	Frampton Mansel.
c. 61 . .	China.
c. 113 . .	St. James, Hagley. Blakedown.
32 & 33 Vict. c. 30 . .	Park Gate Chapel.
36 & 37 Vict. c. 1 . .	Cove Chapel, Tiverton.
c. 20 . .	Fulford Chapel, Stone.
c. 25 . .	Gretton Chapel, Winchcomb.
c. 28 . .	St. John the Evangelist, Eton.
37 & 38 Vict. c. 14 . .	St. Paul, Pooley Bridge.
c. 17 . .	St. John the Evangelist, Bentley.
39 & 40 Vict. c. i. . .	St. James Chapel, Buxton.
40 & 41 Vict. c. lxxii. .	St. Peter's, Almondsbury.
41 & 42 Vict. c. 61 . .	Fiji Islands.
42 & 43 Vict. c. 29 . .	Her Majesty's Ships.
44 & 45 Vict. c. clxvi. .	Alsager Chapel, Barthomley.
47 & 48 Vict. c. i. . .	Stopsley.
c. xii. . .	Wood Green Congregational Church.
c. 20 . .	Members of Greek Church.
48 & 49 Vict. c. cx. . .	St. John, Cowley.
49 & 50 Vict. c. 3 . .	One party resident in Scotland.
51 & 52 Vict. c. 28 . .	By sham Priest.
52 & 53 Vict. c. 38 . .	Basutoland and British Bechuanaland.
54 & 55 Vict. c. 74 . .	Her Majesty's Ships.
55 & 56 Vict. c. 23 . .	British Lines (g).

(g) Note the acts 14 & 15 Vict. c. 40, for India, and 23 & 24 Vict. c. 86, for the Ionian Islands, and 58 Geo. 3, c. 84, validating old marriages in India; 4 Geo. 4, c. 67,

doing the like for marriages at St. Petersburg; 4 Geo. 4, c. 91, doing the like for certain foreign marriages, have been repealed as obsolete.

CHAPTER VIII.

CHURCHING OF WOMEN.

It is remarked by the editor of the Annotated Book of Common Prayer, that the service for the churching of women "underwent scarcely any change in the transition of our offices from the old English system to the new. In 1549 the ancient title was retained, the 'quire door' was substituted for the door of the church, and the address at the commencement of the service was substituted for that at the end of the old one. In 1552 the present title was adopted, and 'the place where the table standeth' put instead of the 'quire door.' In 1661, the two psalms now in use were substituted for the 121st psalm, the second of them being added to the 121st by Bishop Cosin, but the 116th afterwards inserted instead of it (*a*). History of the service.

"Although the churching service does not appear in the ancient sacramentaries, very ancient offices for the purpose are to be found in the rituals of the Western and Eastern Churches, which are given in the pages of Martene and Goar."

According to the rubric before the office for the churching of women, "the woman at the usual time after her delivery, shall come into the church decently apparelled, and there shall kneel down in some convenient place, as hath been accustomed, or as the ordinary shall direct." Rubrics.

Decently apparelled.]—In the reign of King James the First an order was made by the chancellor of Norwich, that every woman who came to be churched should come covered with a white veil: a woman refusing to conform was excommunicated for contempt, and prayed a prohibition, alleging, that such order was not warranted by any custom or canon of the Church of England. The judges desired the opinion of the Archbishop of Canterbury, who convened divers bishops to consult thereupon; and they certifying that it was the ancient usage of the Church of England for women who came to be churched to come veiled, a prohibition was denied (*b*). Veils.

In the records of the ecclesiastical courts are to be found several instances of presentations at visitations of clergymen for refusing to church women who did not wear veils or kerchiefs when they came to make their thanksgivings, and also of women for coming without them (*c*).

(*a*) Blunt, Annotated Book of Common Prayer, p. 304.

(*b*) *Shipden v. Redman*, Palm. p. 296.

(*c*) Archdeacon Hale's Precedents, pp. 237, 259; Blunt, Annotated Book of Common Prayer, p. 304.

Veils appear to have been commonly used in the latter part of the seventeenth century.

Offerings.

By the rubric at the end of the office for churching of women, "the woman that cometh to give her thanks must offer accustomed offerings (*d*); and if there be a communion, it is convenient that she receive the holy communion."

Accustomed Offerings.—In the second year of Geo. II. happened the case of *Naylor v. Scott*. A libel was given in the Consistory Court of York, founded upon a custom, that every one keeping house, and having children in the parish, should pay 10*d*. a child to the parson, at the time the wife is or ought to be churched. The counsel apprehended it to be an unreasonable custom that the parson should have money for doing of nothing, and so moved for a prohibition; for they said the proper way was, if the wife would not be churched at the proper time, to force her to it by ecclesiastical censures. Afterwards the custom being denied, the same was tried on a prohibition, and a verdict given for the custom. Then it was moved in arrest of judgment; 1, That the custom is unreasonable in itself; and 2, That it is uncertainly set forth. To the first it was answered, that religion requires a woman should return thanks to God in a public manner for so great a deliverance; and therefore it is but fit that he who assists her in such office should have some requital. To the second it was said, that there are other cases where the temporal courts allow the ecclesiastical courts to set forth matters equally uncertain as in the present case, even upon libels on customs, and have not granted prohibitions. To this purpose was cited the previous case. But the court said: We are not to consider the methods by which this fee may be ascertained, but only that it is not certain as it stands upon the libel; and therefore upon the libel we ought not to suffer them to proceed. And the proper method in this case would have been, for the plaintiff to set forth in the libel the proper time when women are usually fit to be churched, and then to have averred that the defendant's wife was not churched within that time. And upon the whole matter judgment was arrested (*e*).

Unmarried women.

The service for the churching of women was formerly not used for unmarried women until they had done penance. In 1571, Archbishop Grindal issued an injunction, "That they should not church any unmarried woman which had been gotten with child out of lawful matrimony: except it were upon some Sunday or holyday: and except either she before child-bed had done penance or at her churching did acknowledge her fault before the congregation."

(*d*) "A due to the priest offered on the altar. So Bishop Andrewes interprets it; and so Hooker, *Eccles. Pol. V.*, lxxiv. 4. The Chrisom was formerly included." (Blunt, An-

notated Book of Common Prayer, p. 306.)

(*e*) *Id.* Raym. p. 1558; 1 Barn. K. B. p. 159.

The last rubric in this service enjoins that "The woman who cometh to give her thanks, must offer accustomed offerings; and if there be a Communion, it is convenient that she receive the Holy Communion."

It has been well observed by a recent very learned writer on our liturgical services, that "As the Churching Service is a restoration of the woman to the privileges of the Lord's House, it is clear that it should be said at the beginning of, that is before, any service at which she is to be present for the first time after her recovery. If she is to communicate, a convenient time would be immediately before the Lord's Prayer and Collect for purity, supposing she has not been present at Litany and Mattins; and such a use of this service would doubtless be nearest to the intention of the church in every way. Bishop Sparrow says, that this time was mentioned in visitation articles; and Bishop Wren's directions expressly enjoin it, adding, that if there is a Marriage, the Churching is to come immediately next to the Communion Service, after the conclusion of that for the Marriage. In Bishop Cosin's revised Book he began this rubric, 'the priest here goeth to the Communion Service.' This rule about Holy Communion clearly excludes impenitent unmarried women from 'Churching.' 'Convenient' is a word that meant 'fitting,' more distinctly in former days than now" (f).

Place of
service in the
order of the
day.

(f) Blunt, Annotated Book of Common Prayer, p. 306.

CHAPTER IX.

VISITATION AND COMMUNION OF THE SICK.

Visitation of
the sick.

Canon 67.

As to the visitation and administration of the holy communion to the sick, the following rules are laid down by the church.

By Can. 67 of 1603, "When any person is dangerously sick in any parish, the minister or curate, having knowledge thereof shall resort unto him or her, (if the disease be not known or probably suspected to be infectious), to instruct or comfort them in their distress, according to the order of the communion book, if he be no preacher, or if he be a preacher, then as he shall think most needful and convenient. And when any is passing out of this life, a bell shall be tolled, and the minister shall not then slack to do his last duty. And after the party's death, if it so fall out, there shall be rung no more than one short peal, and one other before the burial, and one other after the burial."

Rubrics.

And by the rubric before the office for the visitation of the sick, "when any person is sick notice shall be given thereof to the minister of the parish," who shall go to the sick person's house, and use the office there appointed.

By other rubrics the minister shall examine the sick person "whether he repent him truly of his sins, and be in charity with all the world; exhorting him to forgive from the bottom of his heart, all persons that have offended him; and if he hath offended any other, to ask them forgiveness; and where he hath done injury or wrong to any man, that he make amends to the uttermost of his power. And if he hath not before disposed of his goods, let him then be admonished to make his will, and to declare his debts, what he oweth and what is owing to him, for the better discharge of his conscience and the quietness of his executors. But men should often be put in remembrance to take order for the settling of their temporal estates whilst they are in health."

And "the minister should not omit earnestly to move such sick persons as are of ability to be liberal to the poor."

As to the special confession of his sins which the sick man is to be moved to make in certain cases, see the chapter on Confession (a).

Communion
of the sick.

By a constitution of Archbishop Peccham, the sacrament of the eucharist shall be carried with due reverence to the sick, the

(a) Part III. Chap. VI., supra.

priest having on at least a surplice and stole, with a light carried before him in a lantern with a bell, that the people may be excited with due reverence, who by the minister's discretion shall be taught to prostrate themselves, or at least to make humble adoration wheresoever the King of Glory shall happen to be carried under the cover of bread (*b*).

But by the rubric of the Prayer Book of 2 Edw. 6, it was ordered that there shall be no elevation of the host, or showing the sacrament to the people.

By the present rubric before the office of the communion of the sick it is ordered as follows: "Forasmuch as all mortal men be subject to many sudden perils, diseases, and sicknesses, and ever uncertain what time they shall depart out of this life; therefore to the intent they may be always in a readiness to die whensoever it shall please Almighty God to call them, curates shall diligently from time to time (but especially in the time of pestilence or other infectious sickness) exhort their parishioners to the often receiving of the holy communion of the body and blood of our Saviour Christ, when it shall be publicly administered in the church; that so doing they may, in case of sudden visitation, have the less cause to be disquieted for lack of the same. But if the sick person be not able to come to the church, and yet is desirous to receive the communion in his house, then he must give timely notice to the curate, signifying also how many there are to communicate with him (which shall be three, or two at the least); and having a convenient place in the sick man's house, with all things necessary so prepared that the curate may reverently minister, he shall there celebrate the holy communion. . . ."

By the rubrics at the end of the same service: "But if a man, either by reason of extremity of sickness, or for want of warning in due time to the curate, or for lack of company to receive with him, or by any other just impediment, do not receive the sacrament of Christ's body and blood, the curate shall instruct him, that if he do truly repent him of his sins, and stedfastly believe that Jesus Christ hath suffered death upon the cross for him, and shed his blood for his redemption, earnestly remembering the benefits he hath thereby, and giving him hearty thanks therefore, he doth eat and drink the body and blood of our Saviour Christ profitably to his soul's health, although he do not receive the sacrament with his mouth."

"In the time of the plague, sweat, or other such like contagious times of sickness or diseases, when none of the parish can be gotten to communicate with the sick in their houses, for fear of the infection, upon special request of the diseased, the minister may only communicate with him."

CHAPTER X.

BURIAL.

- SECT. 1.—*Places of Burial.*
 2.—*The Acts for Cemeteries and Burial Grounds.*
 3.—*Service of Burial.*
 4.—*Fees on Burial.*
 5.—*Mortuaries.*
 6.—*Protection of the Dead.*
 7.—*Monuments of the Dead.*
 8.—*Prayers for the Dead.*
 9.—*The Burial Laws Amendment Act, 1880.*

SECT. 1.—*Places of Burial.*

In ancient
times.

ALL civilized nations (*a*) have set apart from profane uses the burial places of the dead, and have interred them with some religious rites.

The old Romans sometimes showed their respect for the dead by burying them in their houses; but the law of the Twelve Tables prescribed their burial without the walls of the city.

Sometimes they burnt, sometimes they buried their dead.

The primitive Christians (*b*), looking upon their bodies as the temples of the Holy Ghost, rejected the usage of burning, and buried their dead with special religious ceremonies.

Early Chris-
tian practice.

According to the general canon law (*c*), the usual place of burial is the church or churchyard of the parish in which the deceased person lived. And the rites to be observed are those which obtain in that parish and diocese. Exceptions of family vaults and burial places have been engrafted on this rule.

In early times all fees for burial were forbidden as simoniacal; then free offerings came to be made, and in the last stage custom introduced a regular fee.

The right to burial was founded on the dead man having while alive been a member of the Christian community; and

(*a*) Müller, *Lexicon des Kirchenrechts*, tit. Begräbniss; Walter *Lehrbuch*, tit. Von dem Christlichen Begräbniss.

(*b*) Origen, *Op. Omn.* vol. i. *Contra Celsum* lib. viii.; Augustine,

Opera, vol. ii., *De Civitate Dei*, lib. i. c. 13; Tertullian, *De Animâ*, c. 51; cited by Müller.

(*c*) X. iii. 28; VI. iii. 12; Clement, iii. 7; Extra. iii. 6; *De Sepulturis*.

therefore *infideles*, unbelievers, heretics and their abettors, schismatics, those under an interdict, and the excommunicated, were denied this privilege.

It has been said, that the usual place of burial of the dead was the church or churchyard. But the practice of burying within the churches did (though more rarely) obtain before the use of churchyards, but was by authority restrained when churchyards were frequent and appropriated to that use. For among those canons which seem to have been made before Edward the Confessor, the ninth bears this title, *De non sepeliendo in ecclesiis*; and begins with a confession that such a custom had prevailed, but must be now reformed, and no such liberty allowed for the future, unless the person be a priest or some holy man, who by the merits of his past life might deserve such a peculiar favour. However, at the first it was the nave or body of the church that was permitted to be a repository of the dead, and chiefly under arches by the side of the walls. Lanfranc, Archbishop of Canterbury, seems to have been the first who brought up the practice of vaults in chancels, and under the very altars, when he had rebuilt the church of Canterbury, about the year 1075 (*d*).

Place of
burial.

"The practice of sepulture has also varied with respect to the places where performed.—In ancient times caves seem to have been in high request—then gardens or other private demesnes of proprietors; inclosed spaces out of the walls of towns, or by the sides of roads (*siste viator*)—and finally, in Christian countries, churches and churchyards, where the deceased could receive the pious and charitable wishes of the Faithful, who resorted thither on the various calls of worship" (*e*).

No person may be buried in the church, or in any part of it, without the consent of the incumbent. In some of the foreign canons it is said, "without consent of bishop and incumbent;" in others, "without consent of bishop or incumbent." But our common law has given this privilege to the parson only, exclusive of the bishop, in a resolution in the case of *Frances v. Ley*, in 12 Jac. I. (*f*), that neither the ordinary himself nor the churchwardens can grant licence of burying to any within the church, but the parson only; because the soil and freehold of the church is only in the parson, and in none other. Which right of giving leave will appear to belong to the parson, not as having the freehold (at least not in that respect alone), but in his general capacity of incumbent, and as the person whom the ecclesiastical laws appointed the judge of the fitness or unfitness of this or that person to have the favour of being buried in the church. For anciently (as was said) the burying not only in temples and churches, but even in cities, was expressly prohibited. And afterwards, when the burying in churches came to be allowed,

Burying in
the church.

(*d*) Ken. Paroch. Ant. pp. 592, 593. *zard*, 2 Consist. p. 343; 3 Phillim. p. 348.

(*e*) Lord Stowell, in *Gilbert v. Buz-* (*f*) Cro. Jac. p. 367.

and practised, the canon law directs that none but persons of extraordinary merit shall be buried there; of which merit (and by consequence of the reasonableness of granting or denying that indulgence) the incumbent was in reason the most proper judge, and was accordingly so constituted by the laws of the church, without any regard to the common law notion of the freehold being in him, which if it proves anything in the present case, proves too much, that neither without the like leave may they bury in the churchyard, because the freehold of that is also declared to be in him (*g*).

Upon the like foundation of freehold, the common law has one exception to this necessity of the leave of the parson, namely, where a burying place within the church is prescribed for as belonging to a manor house, the freehold of which they say is in the owner of that house, and that by consequence he has a good action at law if he is hindered to bury there (*h*).

Yet nevertheless the churchwardens also by custom may have a fee for every burial within the church, by reason the parish is at the charge of repairing the floor (*i*).

But there is good reason that any parishioner, at his discretion, shall not have the liberty of burying there; especially upon account of the health of the inhabitants to be assembled there for religious worship.

"In our own country, the practice of burying in churches is said to be anterior to that of burying in what are now called church yards, but was reserved for persons of pre-eminent sanctity of life" (*k*). But it is much discountenanced by the present policy of the church (*l*), as injurious both to the stability of the fabric and the health of the parishioners (*m*).

Burying in
the chancel.

But a prescription for a right of burial in a chancel, claimed as belonging to a messuage, was allowed in *Waring v. Griffiths* (*n*).

Rugg v.
Kingsmill.

In the case of *Rugg v. Kingsmill* (*o*), a faculty for the appropriation of a family vault under the chancel of a district church, having been applied for by the lay proprietor of the great tithes, and the owner of the land immediately adjacent to and in the vicinity of the church, was objected to by the vicar of the parish, because, among other reasons, the access to it being only from the exterior, and no churchyard or burial ground attached, there was no consecrated ground outside the church on which any part of the burial service could be performed; such faculty was, however, granted by the ordinary, and the grant thereof confirmed on appeal by the judge of the Arches Court:—it was

(*g*) *Gibs*. p. 453.

(*h*) *Ibid*.

(*i*) *Wats*. c. 39, p. 387.

(*k*) Lord Stowell, in *Gilbert v. Buzzard*, 3 Phillim. p. 349.

(*l*) See Ecclesiastical Courts Commission, 1832, p. 72.

(*m*) See too *Rich v. Bushnell*, 4 Hagg. Eccl. p. 174.

(*n*) 1 Burr. p. 440; *S. C.*, 2 *Ld. Ken*. p. 183.

(*o*) *L. R.* 1 *Adm. & Eccl.* p. 343; 2 *P. C.* p. 59.

holden, however, by the Judicial Committee, that though the granting of such a faculty was entirely within the discretion of the ordinary, such discretion ought to be exercised so as to prevent the possibility of a misuse by the grantee, and that, in the circumstances, the grant ought only to issue on the condition that the grantee appropriated and consented to the consecration of a sufficient piece of ground near the opening of the vault to be so consecrated for the sole and special purpose of burials in the vault, and such faculty was decreed accordingly.

The reason given by Gregory the Great, why it was more profitable to be buried within the precincts of the church, than at a distance, was, because their neighbours, as often as they come to those sacred places, remembering those whose sepulchres they behold, do put forth prayers for them unto God. Which reason was afterwards transferred into the body of the canon law. And this practice of praying for the dead seems to have been the true origin of churchyards, as encompassing or adjoining to the church; which being laid out and inclosed for the common burial places of the respective parishioners, every parishioner has and always had a right to be buried in them (*p*).

Burying in the church-yard:

About the year 750, spaces of ground adjoining the churches were carefully inclosed, and solemnly consecrated and appropriated to the burial "of those who had in their lives continued to attend divine service in those churches, and who now became entitled by law to render back into those places their remains into the earth, the common mother of mankind, without payment for the ground which they were to occupy, or for the pious offices which solemnized the acts of interment" (*q*).

For by the custom of England, any person, except such as are excepted, may be buried in the churchyard of the parish where he dies (*r*).

Is of right.

In the case of *Rex v. Taylor*, it was holden that an information was grantable against a parson for opposing the burial of a parishioner in the churchyard; but as to refusing to read the service over the deceased, because he was never baptized, the court would not interpose; that being a matter cognizable in the ecclesiastical court (*s*). But a custom in a parish for the inhabitants to bury as near as possible to their ancestors, is bad (*t*). The Court will not grant a mandamus to compel a rector to bury the corpse of a parishioner in any particular part of a churchyard (*u*).

It was holden in the case of *Reg. v. Stewart* (*x*), that every person dying in this country, and not within certain ecclesiastical prohibitions, is entitled to Christian burial; and where no such

Duty to bury.

(*p*) *Gibs. p. 453.*

(*q*) *Gilbert v. Buzzard*, 3 Phillim.

p. 349.

(*r*) *Degge*, pt. 1, c. 12.

(*s*) *Serj. Hill's MSS.* (7 D. 278).

(*t*) *Fryer v. Johnson*, 2 Wils. p. 28.

(*u*) *Ex parte Blackmore*, 1 B. & Ad. p. 122.

(*x*) 12 A. & E. p. 773; 4 Per. & Dav. p. 349.

prohibition attaches, *semble* that every householder in whose house a dead body lies is bound by the common law to inter the body decently. The overseers of the parish are not necessarily so bound.

Cremation.

It is not, however, unlawful to dispose of a body by cremation (*y*).

Whether
strangers may
be buried
in the parish
churchyard.

Ordinarily it seems that a person may not be buried in the churchyard of another parish than that wherein he died, at least without the consent of the parishioners or churchwardens, whose parochial right of burial is invaded thereby, and perhaps also of the incumbent whose soil is broken; as in the case of *The Churchwardens of Harrow on the Hill*, it is said, that upon a process against them some years ago, for suffering strangers to be buried in their churchyard, and their appearing and confessing the charge, they were admonished by the ecclesiastical judge not to suffer the same for the future.

Lord Stowell, in *Bordin v. Calcott* (*z*), says, "The churchwardens have been blamed in argument for allowing strangers to be buried there. This is a permission undoubtedly to be sparingly granted, since there can be no absolute claim of that kind." In *Littlewood v. Williams* (*a*), Gibbs, C. J., said, "The counsel for the defendant has been thundering anathemas against the churchwardens, who even with the assent of the vicar, shall permit the bodies of strangers to be deposited in their churchyard. If it could be shown that other parishioners sustained actual inconvenience, it might be different, but if there is not that circumstance, the churchwardens have the discretion lodged with them to judge of the probability of it; . . . On the evidence it does not appear that the vicar has ever interfered to prevent the burial of strangers here; on the contrary, he has buried all who have been brought, but he claims the whole burial fee."

A very eminent civilian (the late Dr. Harris) gave the following opinion when consulted upon this subject:—

Opinions of
eminent
civilians as
to the right
of burial.

"I apprehend the churchyard of a parish belongs in different ways both to the minister and the churchwardens; for I take the soil or surface to belong in general to the minister, and the interior part to the parishioners for burial; and consequently I think that no foreigner or outdweller ought to be buried in the churchyard of the parish mentioned in this case (unless when a traveller or accidental comer happens to die there), without the consent both of the minister and the churchwardens. Neither do I apprehend that the friend or representative of any parishioner can have a right to claim, on the part of the deceased,

(*y*) *Reg. v. Price*, 12 Q. B. D. p. 247. Stephen, J.'s charge to the grand jury is a monument of learning and thought on this subject. See *Williams v. Williams*, 20 Ch.

D. p. 659; *Re Dixon*, (1892) P. p. 386; *Re Kerr*—Consistory of London—July 13, 1894.

(*z*) 1 Consist. p. 17.

(*a*) 6 Taun. p. 277.

more ground than may be sufficient for his burial, for the usual and ordinary allowance; and that if a larger portion of ground should be expected, an application ought to be made to the minister and the churchwardens; and that if a vault should be wanted by the friends of a deceased person, whether foreigner or parishioner, an application ought to be made to the Bishop's Court for a faculty, which is never granted without decreeing and causing public notice to be given to the parishioners of what is intended to be done. I need not now add, that the Rev. Mr. L. has acted unwarrantably if he persuaded Mr. F. that no other authority than that of the minister was necessary. The process, however, should be taken out against Mr. F. (the stranger who erected the vault) if it is the wish of the churchwardens, either to oblige him to reinstate the churchyard, or to apply for a faculty to confirm what has been done; and the method of proceeding should, I apprehend, be by articles, charging him with having removed the remains of deceased persons, and having dug and bricked a vault of such and such dimensions, without a faculty, &c. As to the neglect of reading prayers on parliamentary holidays and other days according to the custom of the church, the proceedings should be by articles, and the rector may also be articled against at the same time, for having given leave to make vaults in the churchyard, and having assumed the power and office of the ordinary, by assuring the persons who applied to him, that no other authority than his own was requisite.

“GEO. HARRIS.

“Doctors Commons, 13th Jan. 1780.”

So in one of the M.S. opinions of the senior Dr. Swabey: “Though the clergyman only has the right of permitting a burial in the church, yet the churchwardens may have a fee for repairing the pavement. The clergyman cannot refuse to bury anybody dying in the parish, which is of right the proper cemetery for their reception, though he may claim his ordinary fee.” 1805.

But where a parishioner dies in his journey, or otherwise, out of the parish, perhaps it may be otherwise: as it seems to be, where there is a family vault or burying place in the church, or chancel, or aisle thereof (b).

Parishioners
dying out of
parish.

By 48 Geo. 3, c. 75, where dead bodies are cast on shore from the seas, the churchwardens or overseers of the parish, or in extra-parochial places the constable or head-borough, are to remove the bodies to some convenient place and cause them to be buried in the churchyard. (Sect. 1.) Their expenses in so doing are to be repaid by the treasurer of the county. (Sect. 6.)

48 Geo. 3,
c. 75.
Dead bodies
in seas or
rivers.

(b) And it was holden by Dr. Lushington that a clergyman will be punished for refusing to perform divine service over the body of a member of a family which is deposited in a private family vault;

even though the member, being a married woman, has ceased to be a parishioner. *Nevill v. Baker*, Arches Court, Nov. 22, 1862. See *Re Sargent*, 15 P. D. p. 168.

The minister, parish clerk and sexton are to perform their respective duties at this as at other funerals, receiving such fees as are paid to them for funerals made at the expense of the parish. (Sect. 2.)

49 & 50 Vict.
c. 20.

These provisions are now by 49 & 50 Vict. c. 20, extended to dead bodies found in or cast ashore from any tidal or navigable waters, and to all such bodies found floating or sunken in any such waters and brought to the shore or bank. This act was passed because of the decision in *The Overseers of Woolwich v. Robertson (c)*.

7 & 8 Vict.
c. 101.
Burial of
paupers.

By 7 & 8 Vict. c. 101, s. 31, the guardians, or overseers if there are no guardians, are to bury every poor person and to charge the expense to the parish to which he was chargeable, or in which he died, or in which his body may be, and unless at the request of the deceased or his relations or for any other cause, they bury—as they may—the dead body in the churchyard or burial ground of the parish to which he was chargeable, they are to bury him “in the churchyard or other consecrated ground in or belonging to the parish, division of parish, chapelry or place in which the death may have occurred;” and the fee or fees payable by custom or statute are to be paid by them out of the poor rates.

18 & 19 Vict.
c. 79.

By 18 & 19 Vict. c. 79, s. 1, where by reason of the public burial ground of the parish being closed the burial cannot take place in the parish, or by reason of its crowded state burial in it would be in the opinion of the guardians or overseers improper, they may bury the body “in a public burial ground (some part of which has been consecrated) of or in some other parish as near as conveniently may be to the parish wherein the burial would have been required to take place” by the last recited Act.

There is a like provision as to payment of fees.

By s. 2, the guardians or overseers may agree with cemetery companies or burial boards for the burial of the dead bodies of poor persons.



SECT. 2.—*The Acts for Cemeteries and Burial Grounds.*

10 & 11 Vict.
c. 65.

By 10 & 11 Vict. c. 65, which is entitled “An Act for consolidating in one Act certain Provisions usually contained in Acts authorizing the making of Cemeteries,” the following provisions are made as to burials of members of the church in such cemeteries.

A part of the
cemetery to
be set apart
and conse-
crated for
burial of
members of

Sect. 23. “The bishop of the diocese in which the cemetery is situated may, on the application of the company, consecrate any portion of the cemetery set apart for the burial of the dead according to the rites of the Established Church, if he be satisfied with the title of the company to such portion, and thinks fit to

consecrate such portion; and the part which is so consecrated shall be used only for burials according to the rites of the Established Church.”

Sect. 24. “The company shall define by suitable marks the consecrated and unconsecrated portions of the cemetery.”

Sect. 25. “The company shall build, within the consecrated part of the cemetery, and according to a plan approved of by the bishop of the diocese, a chapel for the performance of the burial service according to the rites of the Established Church.”

Sect. 26. “No body buried in the consecrated part of the cemetery shall be removed from its place of burial without the like authority as is by law required for the removal of any body buried in the churchyard belonging to a parish church” (*d*).

By sects. 27—31, the company have power to appoint chaplains (*e*).

Sect. 32. “All burials in the consecrated part of the cemetery shall be registered in register books to be provided by the company, and kept for that purpose by the chaplain, according to the laws in force by which registers are required to be kept by the rectors, vicars, or curates of parishes or ecclesiastical districts in England; and such register books, or copies or extracts therefrom, shall be received in all courts in evidence of such burials; and copies or transcripts thereof shall be from time to time sent to the registrar of the ecclesiastical court of the bishop of the diocese in which the cemetery is situated, to be kept with the copies of the other register books of the parishes within his diocese.”

Sect. 33. “The said register books, so far as respects searches to be made therein, and copies and extracts to be taken therefrom, shall be subject to the same regulations as are provided by 6 & 7 Will. 4, c. 86, so far as such regulations relate to register books of burials kept by any rector, vicar, or curate” (*f*).

By sect. 34 the company may appoint and remove a clerk.

Sect. 51. “The bishop of the diocese in which the cemetery is situated, and all persons acting under his authority, shall have the same right and power to object to the placing, and to and (*sic*) procure the removal of any monumental inscription within the consecrated part of the cemetery as he by law has to object to or procure the removal of any monumental inscription in any church or chapel of the established church, or the burial ground belonging to such church or chapel or any other consecrated ground” (*g*).

By 15 & 16 Vict. c. 85, provision is made for closing burial grounds in the metropolis in certain cases, as follows:—

Sect. 2. “In case it appear to her Majesty in council, upon the representation of one of her Majesty’s principal secretaries of state, that for the protection of the public health burials in

established church.

Consecrated ground to be defined.

A chapel in connexion with the Established Church to be constructed.

Bodies when interred not to be removed without lawful authority.

Burials in the consecrated portion to be registered by the chaplain.

Registers to be subject to regulations of 6 & 7 Will. 4, c. 86, as to searches.

Clerk.

Bishop to have power to object to monumental inscriptions in consecrated part of cemetery.

15 & 16 Vict. c. 85.

On representation of secretary of state, her

(*d*) Vide infra, sect. 6.

(*e*) Vide supra, pp. 471, 472.

(*f*) Vide supra, p. 507.

(*g*) So 15 & 16 Vict. c. 85, s. 38.

Majesty in council may order discontinuance of burials in any part of the metropolis.

any part or parts of the Metropolis, or in any burial grounds or places of burial in the Metropolis, should be wholly discontinued, or should be discontinued subject to any exception or qualification, it shall be lawful for her Majesty, by and with the advice of her Privy Council, to order that, after a time mentioned in the order burials in such part or parts of the Metropolis or in such burial grounds or places of burial shall be discontinued wholly, or subject to any exceptions or qualifications mentioned in such order, and so from time to time as circumstances may require; provided that notice of such representation, and of the time when it shall please her Majesty to order the same to be taken into consideration by the Privy Council, shall be published in the London Gazette, and shall be affixed on the doors of the churches or chapels of the parishes in which any burial grounds or places of burial affected by such representation shall be situate, or on some other conspicuous places within the part or parts of the Metropolis affected by such representation, one calendar month . . . at the least before such representation is so considered: Provided always, that no such representation shall be made in relation to the burial ground of any parish until ten days' previous notice of the intention to make such representation shall have been given to the incumbent and the vestry clerk of such parish" (f).

Burial not to take place after order in council for discontinuance.

Sect. 4. "It shall not be lawful, after the time mentioned in any such order in council for the discontinuance of burials, to bury the dead in any church, chapel, churchyard, or burial place, or elsewhere, within the part or parts of the Metropolis or in the burial grounds or places of burial (as the case may be) in which burials have by any such order been ordered to be discontinued, except as in this act or in such order excepted; and every person who shall, after such time as aforesaid, bury any body, or in anywise act or assist in the burial of any body, contrary to this enactment, shall be guilty of a misdemeanor" (g).

Restriction as to place of burial of inhabitants of parishes the burial grounds whereof are closed.

Sect. 5. "After the time from which burials in any place of burial of any parish are required under this act to be discontinued, the body of any parishioner or inhabitant of such parish shall not be buried in any burial ground within the Metropolis belonging to any other parish within the Metropolis, save where the body of any of the family or relatives of such parishioner or inhabitant has been interred in such burial ground, and the relatives or other persons having the care and direction of the funeral signify a desire that on that account the body of such parishioner or inhabitant should be there interred (such burial ground not being a burial ground in which burials have been ordered to be discontinued under this act), and save as herein otherwise provided; and every person having the care or control of any burial ground who knowingly authorizes or permits any

(f) See *Reg. v. St. Mary, Islington*, 25 Q. B. D. p. 523.

(g) This section does not prohibit the burial of cremated ashes under

a church closed for burials by an Order in Council; *In re Kem*, Consistory of London, July 13, 1894.

burial therein contrary to this enactment shall be guilty of a misdemeanor."

Sect. 6. "Notwithstanding any such order in council, where by virtue of any faculty legally granted, or by usage or otherwise, there is at the time of the passing of this act any right of interment in or under any church or chapel affected by such order, or in any vault of any such church or chapel, or of any churchyard or burial ground affected by such order, and where any exclusive right of interment in any such burial ground has been purchased or acquired before the passing of this act, it shall be lawful for one of her Majesty's Principal Secretaries of State from time to time, on application being made to him, and on being satisfied that the exercise of such right will not be injurious to health, to grant licence for the exercise of such right during such time and subject to such conditions and restrictions as such Secretary of State may think fit, but such licence shall not prejudice or in anywise affect the authority of the ordinary or of any other person who, if this act had not been passed, might have prohibited or controlled interment under such right, nor dispense with any consent which would have been required, nor otherwise give to such right any greater force or effect than the same would have had if this act had not been passed."

Saving of certain rights to bury in vaults, &c.

Sect. 8. "Nothing in this act contained shall extend to prevent the interment in the cathedral church of St. Paul's, London, or in the collegiate church of St. Peter's, Westminster, of the body of any person where her Majesty, by any writing under her Royal Sign Manual, shall signify her pleasure that the body be so interred."

Saving as to St. Paul's Cathedral and Westminster Abbey.

This act was amended and extended to other cities and towns by 16 & 17 Vict. c. 134, ss. 1, 3, 4, 5, 6 (*h*).

16 & 17 Vict. c. 134.

By the original act, 15 & 16 Vict. c. 85, the burial boards constituted by it were to have power (by section 30) "to lay out and embellish any burial ground provided by such board in such manner as may be fitting and proper, and to build on any land to be purchased or appropriated for a burial ground under this act, and according to a plan to be approved of by the bishop of the diocese, a chapel for the performance of the burial service according to the rites of the United Church of England and Ireland; and such burial ground may be consecrated by the bishop of the diocese, when the same shall appear to him to be in a fit and proper condition, for the purposes of interment according to the rites of the United Church: Provided always, that in providing any burial ground such board shall set apart a portion thereof which shall not be so consecrated as aforesaid, and may build

15 & 16 Vict. c. 85.

Burial board may lay out ground and build chapel for the services of the church.

(*h*) By sect. 5 of 16 & 17 Vict. c. 134, "cemeteries established under the authority of any act of parliament" are excluded from its operation. It has been holden, that

this does not mean cemeteries established under the Church Building Acts; *Reg. v. Justices of Manchester*, 5 E. & B. p. 702.

thereon a suitable chapel or chapels for the performance of funeral service."

Burial ground to be the burial ground of the parish or parishes for which it is provided.

And by section 32, "From and after the consecration as aforesaid of any burial ground provided under this act (except any portion thereof intended not to be so consecrated), or where all or any part of such burial ground, by reason of the same having been already consecrated, shall not require to be consecrated, then from and after such time as the bishop of the diocese shall appoint, such burial ground shall be deemed the burial ground of the parish for which the same is provided; and where the same is provided for two or more parishes such burial ground shall be in law as if such parishes were one parish, and as if such burial ground were the burial ground of such one parish; and every incumbent or minister of the parish or of each of the parishes (as the case may be) for which such burial ground is provided shall, by himself and his curate, or such duly qualified persons as such incumbent or minister may authorize, perform the duties and have the same rights and authorities for the performance of religious service in the burial in such burial ground, or in the consecrated portion thereof, of the remains of parishioners or inhabitants of the parish of which he is such incumbent or minister, and shall be entitled to receive the same fees in respect of such burials which he has previously enjoyed and received; and the clerk and sexton of such parish or of each of such parishes shall (when necessary) perform and exercise the same duties and functions in respect of the burial of the remains of parishioners or inhabitants of the parish of which he is clerk or sexton in such burial ground or the consecrated portion thereof, and shall be entitled to receive the same fees on such burials, as he has previously performed and exercised and received, as if such burial ground were the burial ground of the respective parish of such incumbent or minister, clerk and sexton respectively; and the parishioners or inhabitants of such parish or of each of such parishes shall have the same rights of sepulture in such burial ground as they respectively would have had in the burial ground or burial grounds in and for their respective parish, subject nevertheless to the provisions herein contained" (i).

16 & 17 Vict. c. 134.

Burial board, building chapel for use of Church, to build one also for Non-conformists.

But according to 16 & 17 Vict. c. 134, s. 7, it is provided, that "In all cases in which any burial board shall provide a new burial ground under the said act of the last session of Parliament or under this act, that new burial ground shall be divided into consecrated and unconsecrated parts in such proportions, and the unconsecrated part thereof shall be allotted in such manner and in such portions as may be sanctioned by one of her Majesty's Principal Secretaries of State; and when any burial board shall by virtue of section 30 of the said act build on any

(i) This section is, so far as it relates to fees, repealed, as to the city of London, by 20 & 21 Vict. c. 35.

burial ground provided by such board a chapel for the performance of the burial service according to the rites of the church of England, . . . they shall also build, on the portion of such ground set apart for burials otherwise than according to the rites of the said church, such chapel accommodation for the performance of burial service by persons not being members of the said church as may be approved of by one of her Majesty's Principal Secretaries of State."

By 18 & 19 Vict. c. 128, s. 14, reciting that, "Doubts have arisen whether in all cases in which any burial board shall build in any burial ground provided by such board a chapel for the burial service according to the rites of the . . . Church of England, such burial board is not also bound by law to build a chapel or chapels upon the unconsecrated part of such burial ground for the performance of burial service for persons not being members of the said Church:" it is enacted, that "In any such case as aforesaid where it shall appear to one of her Majesty's Principal Secretaries of State, upon the representation of a majority of the vestry of any parish, consisting of not less than three-fourths of the members of the same, that the building of a chapel upon the unconsecrated part of any such burial ground for the use of persons not being members of the said Church is undesirable and unnecessary, it shall be lawful for the Secretary of State, if he shall think fit, to signify his opinion to that effect to the burial board of the parish, and the said burial board shall thereupon be relieved from all obligation to build the same: Provided always, that the Secretary of State shall not signify his opinion as aforesaid, unless it be shown to his satisfaction that notice of the intention to propose to such vestry to make such representation was given in manner required by law for notices of vestry meetings, and of the special purposes thereof."

18 & 19 Vict.
c. 128.

Except when
Secretary of
State, on re-
presentation
of vestry,
deems it
unnecessary.

Referring back to sect. 32 of 15 & 16 Vict. c. 85, it has been decided that the burial board has no duty to give the incumbent or minister notice, so that he may perform the burial service and earn the fee; but the board must not (except under the conditions admitted by 43 & 44 Vict. c. 41 (k)) knowingly allow service to be performed in the consecrated part of the ground (at any rate over parishioners of any of the parishes for which it is formed) except by or under the permission of the incumbent (l).

Duty of
Board to
incumbent.

By 20 & 21 Vict. c. 81, s. 6, "Where the guardians of any parish or union are or shall hereafter become possessed of any land suitable to the purposes of a burial ground, and the Poor Law Board shall consent to the same being appropriated to the reception of the dead bodies of any poor persons whom such guardians shall be authorized or required by law to bury, it shall be lawful for the ordinary of the diocese wherein such land shall be situated, if he see fit, to consecrate the whole or a part of such

20 & 21 Vict.
c. 81.

Ordinary may
consecrate
land belong-
ing to a parish
for burial of
poor persons.

(k) Vide infra, sect. 9.

(l) *Wood v. Burial Board of*

Headingley cum Burley, (1892) 1 Q.
B. p. 713.

land for burial purposes, and after consecration the guardians may lawfully direct any such dead body as aforesaid to be buried therein; and the land so consecrated shall not thenceforth be used for any other purposes than for burials according to the rites of the . . . Church of England, . . . and shall be kept in decent order; and the fences thereof, and any building, or other erection therein or adjoining thereto used for the performance of the burial service, shall be maintained in good repair by the guardians out of the common fund of such parish or union: Provided nevertheless, that the guardians shall not be authorized to direct the body of any poor person to be buried in such grounds who, or whose husband, wife, or next of kin, shall, by letter addressed to the master of the workhouse or otherwise, have expressly desired burial to take place elsewhere."

Transfer of
burial ground
provided
under Church
Building Acts
to burial
board.

Sect. 7. "Where a burial ground has been provided for any parish under any of the acts commonly referred to or known as the Church Building Acts, and the same has been consecrated, and any money expended in providing such burial ground has been borrowed, on the security of the church rates, it shall be lawful for the incumbent of the parish, with the consent of the ordinary and the burial board of such parish, or of any borough or district in which such parish is wholly or in part comprised, by instrument in writing under the hands and seals of such incumbent and ordinary, and under the seal of the said burial board, to declare that, in consideration of the payment of the debt by the said burial board, or of such sum as shall be mutually agreed upon, with the consent of the persons, signified in writing under their hands, to whom two-thirds of such debt is due, the said burial ground shall be vested in and be under the care and management of such burial board, and thereupon the same shall be vested in and be under the care and management of such board, and shall be subject to the provisions of the hereinbefore recited acts and this act applicable to a consecrated burial ground or the consecrated part of any burial ground provided by any burial board: and any money borrowed as aforesaid and remaining owing, and the interest due and to become due thereon, and all costs and expenses occasioned by the non-payment thereof, or incurred in providing such burial ground, and then remaining unpaid, shall be charged on and paid out of such rates or fund as under the said last-mentioned acts and this act would be chargeable with the expense of providing a burial ground by such board, and such declaration as aforesaid shall be registered in the registry of the diocese; and such board may, with the approval of the vestry, enlarge such burial ground by the addition of ground to be used for burials otherwise than according to the rites of the church of England, and to be used subject to the provisions of the acts herein recited and of this act in respect to the unconsecrated portions of burial grounds."

As to separa-

Sect. 11. "It shall not be necessary to erect or maintain any

wall or fence between the consecrated and the unconsecrated portions of any burial ground provided under the hereinbefore recited acts and this act, or any of them: Provided always, that in the case of any burial ground where there shall be no such wall or fence, it shall be the duty of the burial board having the care of such burial ground to place, and from time to time to repair and renew such boundary marks of stone or iron as may be sufficient to show the boundaries of such consecrated and unconsecrated portions respectively."

tion of consecrated and unconsecrated part of cemetery.

Sect. 12. "If upon the application in writing by any burial board to the bishop of the diocese for the consecration of a burial ground, declared in such writing to be in a fit and proper condition for the purpose of interment according to the rites of the . . . Church of England, . . . which application the board is required to make as soon as such ground is in such fit and proper condition, the said bishop shall refuse to consecrate the same, it shall be lawful for such burial board to appeal from such refusal to the archbishop of the province, who shall decide the matter in dispute; and if the said archbishop shall decide that the said burial ground is not in a fit and proper condition as aforesaid, then the board shall be bound to put the said ground in a fit and proper condition; and if the said archbishop shall decide that the said burial ground is in a fit and proper condition as aforesaid and ought to be consecrated, such decision shall be communicated in writing by the archbishop to the bishop aforesaid; and if after such communication the said bishop shall not within one calendar month consecrate the said burial ground, the said archbishop shall, under his hand and seal, license the same for the interment of bodies according to the rites of the . . . Church of England, . . . and the licence of the said archbishop so granted as aforesaid shall, until such burial ground be consecrated, operate to make lawful the use of the same as if it had been consecrated."

Appeal to archbishop from refusal of bishop to consecrate.

Sect. 13. "In any burial ground provided under the powers of the acts hereinbefore recited or this act, respecting which one of her Majesty's Principal Secretaries of State shall have certified that the necessary provisions have been complied with, it shall be lawful for the incumbent or incumbents of such parish or parishes for which such burial ground is provided, or his or their curate or curates, or such duly qualified person as any such incumbent may authorize, if such incumbent, curate, or such duly qualified person respectively think fit, to bury in such burial ground prior to the decision of the bishop or archbishop upon the application for the consecration thereof."

Power to clergyman to bury before consecration.

By sect. 23, her Majesty may, by Order in Council, "from time to time order such acts to be done by or under the direction of the churchwardens or such other persons as may have the care of any vaults or places of burial for preventing them from becoming or continuing dangerous or injurious to the public health; and every such Order in Council shall be published in

Orders in Council as to vaults or places of burial dangerous to health.

the London Gazette; and such churchwardens or other persons shall do or cause to be done all acts ordered as aforesaid, and the expenses incurred in and about the doing thereof shall be paid out of the poor rates of the parish." The section goes on to require ten days' notice to the churchwarden or other person, before the order is made.

When faculty
required.

The chancellor of London has holden that upon an Order in Council being made as to any place of burial under ecclesiastical jurisdiction, and such order requiring the removal of coffins and bodies, it is the duty of the churchwardens to apply for a faculty to carry it out. The faculty will then provide for care of the fabric and for mode and place of removal (*m*).

18 & 19 Vict.
c. 128.

Care of closed
ground.

By 18 & 19 Vict. c. 128, s. 18, "In every case in which any Order in Council has been or shall hereafter be issued for the discontinuance of burials in any churchyard or burial ground, the burial board or churchwardens, as the case may be, shall maintain such churchyard or burial ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof; and the costs and expenses shall be repaid by the overseers, upon the certificate of the burial board or churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish or place in which such churchyard or burial ground is situate, unless there shall be some other fund legally chargeable with such costs and expenses."

Where the closed ground is a churchyard, the duty falls on the churchwardens; where it is a mere burial ground, the duty falls on the burial board (*n*). The act does not apply to private burial grounds (*o*).

No building
except church
or chapel on
closed ground.

Use of closed
grounds as
"open
spaces."

The act 47 & 48 Vict. c. 72 prevents the erection of any buildings upon a burial ground closed by Order in Council, except enlargements of a church or chapel.

The acts 44 & 45 Vict. c. 34, and 50 & 51 Vict. c. 32, provide for the use of closed churchyards and other burial grounds as "open spaces" for exercise and recreation in the metropolis and elsewhere, under certain conditions and with certain provisions which will be more fully treated of hereafter (*p*).

Consecration
of church-
yards.

By 30 & 31 Vict. c. 133, amended by 31 & 32 Vict. c. 47, provisions are made for facilitating the consecration of churchyards (*q*); and the powers given to limited owners of conveying sites for schools under 4 & 5 Vict. c. 38, and 12 & 13 Vict. c. 49,

(*m*) *Rector, &c. of St. Mary-at-Hill v. Parishioners*, (1892) P. p. 394; *Rector, &c. of St. Michael, Bassishaw v. Parishioners*, (1893) P. p. 233. The same learned judge had held that, without an order in council, the ecclesiastical court might, on being satisfied of the sanitary necessity, grant such a faculty: *Vicar, &c. of Aldgate v. Parishioners*, (1892) P. p. 161; *Rector,*

&c. of St. Helens v. Parishioners, ib. p. 259; vide *infra*, sect. 6.

(*n*) *Reg. v. Burial Board of Bishop Wearmouth*, 5 Q. B. D. p. 67.

(*o*) *Reg. v. St. John's, Westgate*, 2 B. & S. p. 703.

(*p*) Vide *infra*, Part VI., Chap. II., sect. 5.

(*q*) Vide *infra*, Part VI., Chap. II., sect. 2.

are extended to conveyances of land for churchyards: a form of conveyance is given; and such conveyances are declared to be exempt from stamp duty.

By sect. 7, "From and after the expiration of five years after the conveyance of any lands or hereditaments for such addition to any churchyard or burial place, and the enclosure of the same within one boundary fence, although the same shall not have been consecrated, and although no burial shall have been had within the same during that period of time, the said lands and hereditaments shall for the purposes of this act become and be and remain absolutely vested in the person or persons or corporation in whom the churchyard or burial place to which they are added is vested, free from all demand or claim of any person or persons or corporation whatsoever, and without being thereafter subject to any question as to any right, title, or claim thereto, or in any manner affecting the same."

No claim to land set apart after five years.

By sect. 9, as amended by 31 & 32 Vict. c. 47, s. 1, "When any land shall be so added to a consecrated churchyard, and such land shall have been the gift of any person, whether resident or not in the parish or ecclesiastical district in which such churchyard is situated, it shall be lawful for the giver of such land to reserve the exclusive right in perpetuity of burial and of placing monuments and gravestones in a part of the land so added not exceeding one-sixth of the whole of the said land, and the part in which such exclusive right is reserved shall be shown and coloured on the plan endorsed on the instrument declaring or recording the consecration of the land added to the churchyard; and a memorandum, in the form 'given in the act,' shall be written on the said instrument and signed by the incumbent and churchwardens of the parish or ecclesiastical district in which the same is situated"; and . . . "the memorandum so signed shall, after such land shall have been declared to have been consecrated, operate as an exclusive right in perpetuity in the land therein referred to, and the expenses of preparing and executing such memorandum shall be borne by the person by whom the reservation is made."

Exclusive right to one-sixth of land added to churchyard may be secured to donor.

Sect. 10. "The exclusive right of burial and of placing monuments and gravestones as aforesaid shall be considered to be the real estate of the giver, his heirs and assigns, and no body shall be buried or monument or gravestone placed in the land in which such rights have been granted, except by consent of the owner thereof for the time being, but no such reservation shall give the right to bury the body of any person not entitled to be buried in consecrated ground; and the bishop of the diocese, and all persons acting under his authority, shall have the same right and powers to object to the placing and to procure the removal of any monumental inscription within the ground so reserved as he has to object to or procure the removal of any monumental inscription in any consecrated ground: Provided always, that the consent of the

Such reserved portion to be subject to same conditions as other consecrated land.

owner for the time being shall not be required for the burial of a deceased owner or of a wife or widow of any deceased owner who has been buried or shall be about to be buried in such ground."

As to closing
by Secretary
of State.

Sect. 11. "Such reserved portion shall not be included in any Order in Council under the Burial Acts for closing the churchyard to which it belongs, but it may be closed under a separate Order founded on a special report that the ground is in such a state as to render any further interments therein prejudicial to the public."

Service need
not be per-
formed on
unconsecrated
ground.

In the case of *Rugg v. Kingsmill*, already referred to (*r*), it was laid down that the ordinary cannot compel an incumbent by ecclesiastical censure to perform the burial service on the unconsecrated ground in which the only entrance to a particular vault is to be found.

No reverter of
consecrated
ground.

In the case of *Campbell v. The Mayor and Corporation of Liverpool* (*s*), by an act of Will. III., certain land belonging to the parish of Liverpool was set apart and dedicated to the use of a burial ground, and by the sentence of consecration the corporation renounced all right to the land; and it appeared that in 1854 the ground was closed against burials by an order in council. In 1866 the corporation, being authorized to take a portion of the burial ground under the Liverpool Improvement Act, served upon the rector, ordinary, and patron of the parish, the usual notice to treat, and upon a reference to arbitration a sum of money was awarded for compensation; but the corporation subsequently refused to pay, upon the ground that the fee simple of the land reverted to the corporation upon its being closed against burials, and the use for which it was dedicated having come to an end:—it was holden, however, that by the act of parliament, followed by the sentence of consecration, the land was dedicated for ever to the use of a burial ground, and there was no reverter of the fee to the corporation; and that, if necessary, the court would presume a conveyance of the legal estate by the corporation.

42 & 43 Vict.
c. 31.
Cemeteries
made by
sanitary
authorities.

A further provision for the supply of public burying grounds has been made by Mr. Martin's Act (42 & 43 Vict. c. 31). This act, which is to be construed with the Public Health Act, 1875 (38 & 39 Vict. c. 55), called "the principal act," and with the Cemeteries Clauses Act, 1847 (10 & 11 Vict. c. 65), provides as follows by sect. 2: "(1.) The provisions of the principal act, as to a place for the reception of the dead before interment, in the principal act called a mortuary, shall extend to a place for the interment of the dead, in this act called a cemetery; and the purposes of the principal act shall include the acquisition, construction, and maintenance of a cemetery.

"(2.) A local authority may acquire, construct, and maintain a cemetery either wholly or partly within or without their dis-

(*r*) L. R. 2 P. C. p. 59. Vide
supra, p. 652.

(*s*) L. R. 9 Eq. p. 579.

trict, subject as to works without their district for the purpose of a cemetery to the provisions of the principal act as to sewage works by a local authority without their district.

“(3.) A local authority may accept a donation of land for the purpose of a cemetery, and a donation of money or other property for enabling them to acquire, construct, or maintain a cemetery.”

The local authority means the sanitary authority, rural or urban. The clause in the principal act as to mortuaries is sect. 141.

By sect. 258 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5): 53 & 54 Vict. c. 5.

“(1.) The visiting committee of an asylum, with the consent of the local authority by whom they are appointed and of a secretary of state, may provide for the burial of lunatics dying in the asylum and of the officers and servants belonging thereto—
Cemeteries made for lunatic asyla.

“(a) By appropriating any land already belonging to them or acquiring any land, not exceeding in either case two acres, for enlarging an existing burial ground or for providing a new burial ground:

“(b) By agreeing with any corporation, or persons, or body of persons willing to provide for the burial of such lunatics and other persons as aforesaid.

“(2.) The committee may procure the consecration of a new or enlarged burial ground, and in the case of a new burial ground, may provide for the appointment of a chaplain therein.

“(3.) The incumbent of the parish in which a new or enlarged burial ground provided by a visiting committee is situate, shall not be entitled to any fee for the interment of any person buried therein by direction of the committee.”

SECT. 3.—*Service of Burial.*

In the case of *Reg. v. Fox (t)*, it was held that a gaoler might not detain the body of one dying in his custody for fees or other expenses. It was at one time a vulgar error that a body might be seized by creditors. This was not the law, even when it was customary to imprison for debt.

Whether burial may be hindered for debt.

In 1745, a remarkable case happened after the rebel assizes at Carlisle, where some of the rebels died after their attainder, and before execution. The question was, whether they should be admitted to Christian burial? And the then lord bishop of the diocese requested the opinion of a very learned gentleman; who made the following remarks and extracts for his lordship's consideration:

As to burial of attainted traitors.

“It is certain, that after execution, the bodies being at the

(t) 2 Q. B. p. 246; *S. C. nom. In the Matter of the Bailiff of Wakefield*, 1 G. & D. p. 556.

king's disposal, are, for the public example, and for the greater terror unto others, never admitted to Christian burial; and this seemeth to have been the law of the church of England from two ancient canons, by the former of which it is ordained as follows: 'Concerning those who by any fault inflict death upon themselves, let there be no commemoration of them in the oblation, as likewise for them who are punished for their crimes; nor shall their corpses be carried unto the grave with psalms.' By the latter—'If any shall voluntarily kill himself by arms, or by any instigation of the devil, it is not permitted that for such a person any masses be sung, nor shall his body be put into the ground with any singing of a psalm, nor shall he be buried in pure sepulchre. The same shall be done to him, who for his guilt endeth his life by torments, as a thief, murderer, and betrayer of his lord' (*u*).

"But before execution, the case seems to be different.

* * * * *

"And Lord Coke says, 'Albeit judgment be given against a man in case of treason or felony, yet his body is not forfeited to the king, but until execution remaineth his own; and therefore before execution, if he be slain without authority of law, his wife shall have an appeal; for notwithstanding the attainder he remained her husband' (*x*).

"So if a man commit treason, and after judgment become of non sane memory, he shall not be executed; for it cannot be example to others (*y*).

"So if the gaoler keep a prisoner more straitly than he ought of right, whereof the prisoner dies, this is felony in the gaoler by the common law; and this is the cause, that if a prisoner die in prison, the coroner ought to sit upon him (*z*).

"And particularly that the church admitted such persons to Christian burial, seems somewhat evident in that she admits them to the receiving of the holy communion, and other rites of the church, during the time of their condemnation, and approves of the ministers of the church of England attending them to the last extremity."—And those rebels were admitted to Christian burial.

Mode of
burial is of
ecclesiastical
cognizance.

Burial in the parish churchyard is a common law right inherent in the parishioners, but the mode of burial is of ecclesiastical cognizance (*a*), and therefore the court refused a mandamus to inter the body of a parishioner in an iron coffin (*b*). This was the celebrated case which afterwards

(*u*) *Canones editi sub Edgardo rege*: 1 Wilkins, *Concilia*, pp. 225, 232; Johnson's *Canons*, A.D. 740, No. 96, and A.D. 963, No. 24.

(*x*) 3 Inst. p. 214 †. These quotations from Lord Coke, though substantially are not literally accurate.

(*y*) 3 Inst. p. 4.

(*z*) 3 Inst. p. 91.

(*a*) This proposition is to be taken as somewhat modified by the Burial Laws Amendment Act, 1880. Vide *infra*, sect. 9.

(*b*) *Rex v. Coleridge*, 2 B. & Ald. p. 806; 1 Chit. p. 588.

formed the subject of one of Lord Stowell's most elaborate judgments, and from which some extracts have already been made in this chapter—the case of *Gilbert v. Buzzard* (c). Lord Stowell permitted the interment of bodies in patent iron coffins, subject to an increased rate of payment to the parish. “Some *involucra* or coverings” he said “have been deemed necessary in all civilized and Christian countries; but chests or trunks containing the bodies descending along with them to the grave and remaining there till their own decay, cannot plead either the same necessity nor the same general use. . . . In our own country, the use of coffins is extremely ancient, though most probably by no means general. . . . It is to be observed, that in the funeral service of the church of England there is no mention, indeed, there is rather an apparently studious avoidance of any mention of coffins. It is throughout the whole service the corpse or the body. . . . I observe, likewise, that in old tables of burial fees a distinction of payment is made for coffined funerals and uncoffined funerals. From which I draw this conclusion of fact, that uncoffined funerals were, at that time by no means so unfrequent as not to require a particular notice or provision. . . . I think I might also venture to deduce this conclusion, . . . that even at that time (1627), it was recognized as not unjust, that where the deceased by the use of his coffin took a larger occupancy of the ground, he should compensate the parish by an increased payment.”

By Can. 68 of 1603, in substance, no minister shall refuse or delay to bury any corpse that is brought to the church or churchyard (convenient warning being given him thereof before), in such manner and form as is prescribed in the Book of Common Prayer. And if he shall refuse so to do, except the party deceased were denounced excommunicated *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance, he shall be suspended by the bishop of the diocese from his ministry, by the space of three months (d).

Canon 68.
Minister not
to refuse
burial, except
in certain
cases.

Were denounced excommunicated.]—But by the rubric before the office for burial of the dead, the said office likewise shall not be used for any that die unbaptized, or that have laid violent hands upon themselves.

And no man able to testify of his repentance.]—But where sufficient evidence did appear to the bishop of such person's repentance, commissions have been granted, both before and since the Reformation, not only to bury persons who died excommunicate, but in some cases to absolve them in order to Christian burial (e). Even persons dying in a state of intoxica-

(c) 2 Consist. p. 338; 3 Phillim. p. 335.

(d) Vide supra, p. 487, for this canon *in extenso*.

(e) Gibs. p. 450.

tion must be buried with the funeral service of the church (*f*), and so must dissenters (*g*).

Causes of refusal of burial under old canon law.

There were anciently other causes of refusal of burial, particularly of heretics, against whom there was an especial provision in the canon law, that if they continued in their heresy, they should not have a Christian burial: of which we have a remarkable instance a little before the Reformation, in the case of one *Tracy*, who was publicly accused in convocation of having expressed heretical tenets in his will; and being found guilty, a commission was issued to dig up his body, which was accordingly done.

Also persons not receiving the holy sacrament, at least at Easter, were excluded from Christian burial by a decree of the fourth Lateran council, which became afterwards a law of the English Church.

In like manner, persons killed in duels, tilts or tournaments.

But at this day it seems that these prohibitions are restrained to the three instances before mentioned; of persons excommunicate, unbaptized, and that have laid violent hands upon themselves.

As to suicides.

And of this last sort are to be understood, not all who have procured death unto themselves, but who have done it voluntarily, and consequently have died in the commission of a mortal sin; and not idiots, lunatics, or persons otherwise of insane mind.

The first ecclesiastical rule which occurs as to this matter is the 34th canon of the first council of Braga, in the year 563; which forbids any burial service for those *qui violentam sibi ipsis inferunt mortem*. But in Wilkins's Councils (*h*), the 5th chapter of the 2nd book of the Pœnitential of Egbert, archbishop of York, written about the year 750, (which chapter is plainly taken from the canon of Braga,) adds this limitation, "If they do it by the instigation of the devil." And the 15th of the canons published in King Edgar's time, about the year 960, adds a further limitation, "If they do it voluntarily by the instigation of the devil" (*i*). These two authorities Wheatly, On the Common Prayer, quotes from Johnson's collection, to prove that our old ecclesiastical laws make no exception in favour of those who kill themselves in distraction (*k*). But they prove, even as they stand in Johnson, that such were not comprehended under those laws. And accordingly, the Decretum of Gratian (*l*), inserting the canon of Braga, adds to it "*voluntarie*." And the note there is, "*secus, si per furorem: tunc non imputaretur*."

Now we should not, without necessity, understand our own

(*f*) *Cooper v. Dodd*, 2 Roberts. p. 270; 7 N. C. p. 514.

(*g*) *Escott v. Mastin*, 4 Moo. P. C. C. p. 104; and p. 494, *supra*; *Nurse v. Henslowe*, 3 N. C. p. 272.

(*h*) 1 Wilkins' Concilia, p. 129.

(*i*) *Ibid.* p. 232.

(*k*) Wheatly on the Book of Common Prayer, p. 405.

(*l*) 23, Q. 5, 12.

rubric to be so much severer than the preceding constitutions, as to place mad people in the same rank with excommunicate and unbaptized persons, and to punish a poor creature for what in him indeed was no crime.

The proper judges whether persons who died by their own hands were out of their senses are, doubtless, the coroner's jury. Or if the body cannot be viewed, the justices in session may inquire of the felony (*m*); but their finding is traversable. The minister of the parish has no authority to be present at viewing the body, or to summon or examine witnesses. And therefore he is neither entitled nor able to judge in the affair; but may well acquiesce in the public determination without making any private inquiry. Indeed, were he to make one, the opinion which he might form from thence, could usually be grounded only on common discourse and bare assertion. And it cannot be justifiable to act upon these, in contradiction to the decision of a jury after hearing witnesses upon oath. And though there may be reason to suppose that the coroner's jury are frequently favourable in their judgment, in consideration of the circumstances of the deceased's family; and their verdict is in its own nature traversable: yet the burial may not be delayed until that matter, upon trial, shall finally be determined. But on acquittal of the crime of self-murder by the coroner's jury, the body in that case not being demanded by the law, it seems that a clergyman may and ought to admit that body to Christian burial. The inquisition of the coroner, upon view of the body, is not traversable by the executors or administrators of the deceased; but evidence shall be heard by him to prove the deceased *non compos*; which, if he refuse the inquisition, may be quashed by the King's Bench, who are the sovereign coroners (*n*).

By 45 & 46 Vict. c. 19, s. 2, it is enacted that "it shall not be lawful for any coroner or other officer having authority to hold inquests, to issue any warrant or other process directing the interment of the remains of persons, against whom a finding of *felo de se* shall be had, in any public highway, or with any stake being driven through the body of such person, but such coroner or other officer shall give directions for the interment of the remains of such person *felo de se* in the churchyard or other burial ground of the parish or place in which the remains of such person might, by the laws or custom of England, be interred, if the verdict of *felo de se* had not been found against such person."

By sect. 3 the interment "may be made in any of the ways prescribed or authorized by" 43 & 44 Vict. c. 41.

By sect. 4, "save as aforesaid, nothing herein contained shall authorize the performing any of the rites of Christian burial on

(*m*) 3 Inst. p. 54 †.

(*n*) 3 Inst. p. 54†; 1 Hale, P. C. p. 414.

Inquests.

45 & 46 Vict. c. 19.

the interment of the remains of any such person as aforesaid, or be taken to alter the laws or usages relating to the burial of such persons.”

As a general rule no body to be buried in churchyard without service.

In *Kemp v. Wickes* (o) Sir John Nicholl says, “Our church knows no such indecency as putting the body into the consecrated ground without the service being at the same time performed;” and cites the act 3 Jac. 1, c. 5, compelling such service to be read over popish recusants, which has been since repealed.

Warning.

What is a “convenient warning” must depend in some degree on the facts of each case. The law on this subject was considered in *Titchmarsh v. Chapman* (p).

Office of burial.

By the rubric: “The priest and clerks meeting the corpse at the entrance of the churchyard, and going before it either into the church or towards the grave, shall say or sing”

By which it seems to be discretionary in the minister whether the corpse shall be carried into the church or not. And there may be good reason for this, especially in cases of infection.

Except under the Burial Laws Amendment Act, 1880 (q), it is illegal for a layman or for any one, unless he be lawfully authorized, to read or assist in reading a burial service in consecrated ground over a dead body (r).

Canon 67. Ringing at funerals. Registration of burials.

By Can. 67 of 1603 (s), “After the party’s death there shall be rung no more but one short peal, and one before the burial, and one other after the burial.”

The registration of burials as ordered by Can. 70 of 1603, and 52 Geo. 3, c. 146, has been treated of at length under the chapter on Baptism (t).

It is only necessary to add that the form of register, as provided by the statute, for burials is as follows:—

“SCHEDULE C.

Burials in the parish of A., in the county of B., in the year one thousand eight hundred and thirteen.				
Name.	Abode.	When buried.	Age.	By whom the Ceremony was performed.
John Wilson.	Duke Street, Westminster.	1813. 1st May.	62.	
No. 1.				

And that where the burial takes place in any place other than the parish church or churchyard, or the chapel or chapelyard of

(o) 3 Phillim. p. 295.
(p) 1 Roberts. p. 175; 3 N. C. p. 370. See *Re Todd*, *ibid.* p. li.
(q) Vide *infra*, sect. 9.
(r) *Johnson v. Friend and Ballard*, 6 Jur., N. S. p. 280. Approved in

Wood v. Burial Board of Headingley cum Burley, (1892) 1 Q. B. p. 713.
(s) Quoted in full, *supra*, p. 648.
(t) Vide *supra*, Part III., Chap. II., pp. 496—508.

a chapelry having its own registers under sect. 4 of the act, the form of certificate of burial is as follows:—

“SCHEDULE D.

“*I do hereby certify that on the day A. B. of aged was buried in [stating the place of burial], and that the ceremony of burial was performed according to the rites of the United Church of England and Ireland by me,* .
“*To the rector [or as the case may be] of* .”

By 37 & 38 Vict. c. 88, s. 17, a coroner, upon holding an inquest, may order a body to be buried before registry of the death; and the registrar, upon registering a death or receiving a written requisition to attend and register a death, or upon receiving written notice of a death accompanied by a medical certificate, shall give a certificate that he has registered or received notice of the death, as the case may be. 37 & 38 Vict. c. 88.

The section then provides as follows:

“The person who buries or performs any funeral or religious service for the burial of any dead body, as to which no order or certificate under this section is delivered to him, shall, within seven days after the burial, give notice thereof in writing to the registrar, and if he fail so to do shall be liable to a penalty not exceeding ten pounds.” In what cases notice to be given to registrar.

Sect. 18 of the same act makes provision for the burial of still-born children. Still-born children.

The registration of burials in cemeteries under 10 & 11 Vict. c. 65, has been already mentioned (*u*).

SECT. 4.—*Fees on Burial.*

“We do firmly enjoin that burial . . . shall not be denied to any one, upon the account of any sum of money; . . . because if anything hath been accustomed to be given by the pious devotion of the faithful, we will that justice be done thereupon to the churches by the ordinary of the place afterwards” (*x*). Constitution of Archbishop Langton.

Shall not be denied.]—Or delayed (*y*).

Upon the account of any sum of money.]—For burial ought not to be sold: but albeit the clergy may not demand anything for burial, yet the laity may be compelled to observe pious and laudable customs. But in such case the clerk must not demand anything for the ground, or for the office; but if he shall allege, that for every dead person so much has been accustomed to be given to the minister or to the church, he shall recover it (*z*).

(*u*) Vide supra, p. 657.

(*x*) Lind. p. 278. See this constitution in Latin at length, supra,

p. 508.

(*y*) Ibid.

(*z*) Ibid.

Hath been accustomed to be given.—That is, of old, and for so long time as will create a prescription, although at first given voluntarily. For they who have paid so long are presumed at first to have bound themselves voluntarily thereunto (a).

As to fee on
person dying
in a parish.

In *Topsall v. Ferrers* (15 Jac. 1), Edward Topsall, parson of St. Botolph's without Aldersgate, London, and the churchwardens of the same, libelled in the ecclesiastical court against Sir John Ferrers, and alleged that there was a custom within the city of London, and especially within that parish, that if any person being man or woman die within that parish, and be carried out of the parish to be buried elsewhere, in such case there ought to be paid to the parson of this parish if he or she be buried elsewhere in the chancel so much, and to the churchwardens so much, being the sums that they alleged were by custom payable unto them for such as were buried in their own chancel; and then alleging that the wife of Sir John Ferrers died within the parish, and was carried away and buried in the chancel of another church, and so demanded of him the said sum. Whereupon for Sir John Ferrers a prohibition was prayed, and upon debate it was granted, for this custom is against reason, that he that is no parishioner, but may pass through the parish, or lie in an inn for that night, should if he then die be forced to be buried there, or to pay as if he were, and so upon the matter to pay twice for his burial (b).

The case is cited by Sir G. Lee in a very learned judgment, in *Patten v. Castleman*, where he decided that the claim of a vicar for a fee on the wedding of one of his parishioners in the church of another parish, would not be substantiated, on the general principle of law, that where no service is done no fee can be due (c).

But Dr. Gibson says, a fee for burial belongs to the minister of the parish in which the party deceased heard divine service, and received sacraments, wheresoever the corpse be buried. And this, he observes, is agreeable to the rule of the canon law, which says that every one, after the manner of the patriarchs, shall be buried in the sepulchre of his fathers; nevertheless, that if any one desires to be buried elsewhere, the same shall not be hindered, provided that the accustomed fee be paid to the minister of the parish where he died, or at least a third part of what shall be given to the place where he shall be buried. For the understanding of which it is to be noted, that anciently all persons in their wills made a special oblation or bequest to the church at which they were to be interred; and the people in those days depending much upon the prayers of the living for the good of their souls after death, those of better condition coveted oftentimes to be buried in religious houses, with a view to greater assistances which they hoped to receive from the

(a) Lind. p. 279.

(b) Hob. p. 175.

(c) 1 Lee, p. 387; vide supra, p. 633.

solemn and constant devotions there: also, where the oblations were likely to be plentiful, the religious were led by that prospect to desire and promote it. By which means parochial ministers would have been deprived of what belonged of common right to them, and to no other; if the laws which indulged them in being buried in religious houses, had not at the same time provided for the ancient parochial rights; which sometimes was the third, sometimes the fourth part (according to the customs of different places) of what was given to the religious houses: the laws probably presuming, that the oblations to those houses would be much larger than what was usually given to the parochial ministers (*d*).

And this was called the canonical portion; and the oblation grew by custom into a fixed right of the parish minister. And hence it is, that in dispensations for burying elsewhere, reservations have been made of the rights of those churches where the parties die. And (to take off the weight in some measure of the case of *Topsall v. Ferrers*) he says, that this right was not denied, but seemingly acknowledged, by the temporal court in the aforesaid case, where the suit by the rector and churchwardens of St. Botolph's, Aldersgate, was for the customary fee of burying in the chancel there, because the person died in their parish, and was buried in the chancel elsewhere. For though a prohibition was granted because the custom was unreasonable, yet that unreasonableness (he says) was grounded upon the person's being only a stranger, and happening to die in the parish. For so the report itself expresses the ground of the prohibition. "This custom is against reason, that he who is no parishioner, but may pass through the parish, or lie in an inn for a night, should be forced to be buried there, or pay as if he were." Which is in effect a recognition of the right, in case the party deceased has dwelling in the parish, and is a parishioner (*e*).

Mr. Fraser (*f*) remarks that this does not so well agree with the last words of the recited case, which supposes it to be unreasonable for a man to pay twice for his burial; and so the matter seems to rest.

Coming now to fees on actual burials, Sir Simon Degge says, that the accustomed fee to the parson for breaking the soil in the church, is for the most part 3s. 4d. and for breaking the floor in the chancel 6s. 8d. (*g*).

Fee for burial within church.

In *Andrews v. Cauthorne* (*h*), it is laid down that the vicar is not entitled, either by the common or canon law, to demand a fee for burying in the churchyard, although such a fee may be due by special custom.

Fee for burial in churchyard only due by custom.

Not only the obligation to pay fees, but the proportion of fees due for the burial of persons, whether to the incumbent or

(*d*) Gibs. p. 452.

of Burn's Eccl. Law, 1797 and 1809.

(*e*) Ibid.

(*g*) Degge, pt. 1, c. 12.

(*f*) Editor of 6th and 7th editions

(*h*) Willes, p. 536.

churchwardens depends upon the particular usage and custom of each parish respectively. For as to the incumbent for burying, the foundation of the fee was voluntary, and the obligation or necessity of paying arises from custom; which is the ground of what is before observed out of Lindwood.

How custom
to be ascer-
tained.

But although the rule of the canon law is, that in case of denial of the customary fee justice is to be done by the ordinary, and though the books of the common law allow this to be in its nature a matter properly of spiritual cognizance, yet it is a very great abatement from that allowance that the temporal courts reserve to themselves the right of determining, first, whether there is such a custom, in case that is denied; and, secondly, whether it is a reasonable custom in case the custom itself is acknowledged. Upon the first of these heads, a prohibition was granted in the case of *Andrews v. Symson* (i), in 27 Car. 2. And we find other prohibitions also granted, as where the church of Westminster, for burying in the abbey, demanded 50*l.* (k) and the cathedral of York 5*l.* (l), and the cathedral of Exeter 10*l.* (m), over and above the common fees.

But here it is to be observed that in the foregoing case of *Andrews v. Symson*, the demand was a fee of four nobles for a parishioner, and of four marks for a stranger; which proportion and difference were not excepted against by the court as unreasonable, but (as has been said) the prohibition went only because the custom was denied (n).

In some cases
the ordinary
fixes amount
of fees.

In *Gilbert v. Buzzard* (o), Lord Stowell said, "Very ancient Canons forbid the taking of money for interment, upon the notion that consecrated grounds are among the '*res sacræ*,' and that money payments for them were therefore acts of a simoniacal complexion; but this has not been the way of considering that matter since the Reformation, for the practice goes up at least nearly as far; it appears founded upon reasonable considerations, and is subjected to the proper controul of an authority of inspection. In populous parishes, where funerals are very frequent, the expense of keeping churchyards in an orderly and seemly condition, is not small, and that of purchasing new ones, when the old ones become surcharged, is extremely oppressive. To answer such charges both certain and contingent, it surely is not unreasonable that the actual use should contribute when it is called for. At the same time, the parishes are not left to carve for themselves in imposing these rates; they are all submitted to the examination of the ordinary, who exercises his judgment and expresses the result by a confirmation of their propriety in terms of very guarded caution. It is, perhaps not

(i) 3 Keb. p. 523.

(k) Gibs. p. 453.

(l) *Frain v. Dean and Chapter of York*, 2 Keb. p. 778.

(m) *Dean and Chapter of Exeter's case*, 1 Salk. p. 333.

(n) Gibs. p. 453.

(o) 3 Phillim. p. 335; 2 Consist. p. 338.

easy to say where the authority could be more properly lodged or more conveniently exercised."

Lord Stowell, acting as chancellor for the diocese of London, adjusted the table of burial fees in St. Andrews, Holborn (*p*).

In an anonymous case in 2 Shower, 134, it is said, that in the neighbourhood of London, the churchwardens are entitled to the money for burying in the church or churchyard; the parson's right being confined to the chancel. In *Gilbert v. Buzzard*, Lord Stowell says, "An objection was taken to the application of the fee, as stated in the table. . . . The objection to the incumbent's proportion, seems entirely to forget that by the general law it is the incumbent who has the freehold of the soil of the churchyard, though provided originally by the parish. By acquiescence, confirmed by usage, parishes in this Town and neighbourhood have acquired concurrent rights, into the validity of which it is quite unnecessary and improper for me to enquire." In *Littlewood v. Williams* (*q*), it was proved that a practice had prevailed in the parish of Hendon, during the incumbency of several vicars, that upon the burial of any stranger certain fees should be paid, of which the vicar took one moiety, and the churchwardens the other for the use of the poor. The fees were paid to the sexton, who paid over the moieties to the use of the respective parties. A new vicar refused to accede to this arrangement; he buried several strangers, and made the sexton pay over the entire fees to himself, and it was holden that the churchwardens might in an action for money had and received recover one moiety to their use.

Fees in the neighbourhood of London.

In January 18, 1839, Dr. Spry proceeded in the Consistory Court of London, against the guardians of the poor in Marylebone, for refusing to pay the burial fees of paupers to the rector of the parish. The judge said, that "it was clear that the ecclesiastical courts had been permitted to exercise some jurisdiction on the subject, because the courts of common law, where prohibition had been moved for, had not granted it, on the general ground that these courts were wholly incompetent to hold pleas on the subject-matter but on special grounds (*r*). Prohibition has been granted because the fee was not accustomed and certain, and the ecclesiastical court would not try the custom where it was denied. The granting prohibition for special reasons establishes the existence of the jurisdiction which is recognized by the statute *Circumspectè agatis*. This court is allowed to enforce fees to clergymen for spiritual duties due by custom, the duty being actually performed (*s*). By customary fees are meant such as have existed so long that their origin

Dr. Spry's Case.

(*p*) *Gilbert v. Buzzard*, 2 Consist. p. 333.

(*q*) 6 Taun. p. 276; 1 Marsh. p. 589.

(*r*) *Burdeau v. Lancaster*, 1 Salk. p. 332; *Topsall v. Ferrers*, Hob. p. 175.

(*s*) 3 Black. Com. p. 90.

cannot be traced. The foundation of all such is that they were originally voluntary. Customary burial fees of this nature may be sued for here, at least until the custom has been denied, and prohibition moved for *propter defectum triationis*. The subject, however, is not without difficulty, for no such suit has been brought for a century; and I can find nothing in the books as to one liable for these fees." In that case the judge dismissed the suit, because the case was governed by particular acts of parliament, and a preliminary remedy by mandamus ought to have been had to compel the vestrymen to fix the table of rates and fees (*u*).

6 & 7 Will. 4,
c. 86.

6 & 7 Will. 4, c. 86, enacts by sect. 49, "That nothing herein contained shall affect the registration of . . . burials as now by law established, or the right of any officiating minister to receive the fees now usually paid for the performance or registration of any . . . burial . . ." (*v*).

Whether
action at law
for burial fees
in common
law courts.

In the case of *Spry v. Gallop* (*x*), it was holden that burial fees should be sued for in the ecclesiastical courts and cannot be recovered in those of common law.

But an action at law can be successfully maintained by an incumbent as upon a special contract, for a special fee payable upon the burial of a non-parishioner in a vault (*y*).

Fees in new
parishes.

As to questions between the incumbents of old and new parishes which have the right to such fees, see the chapter on the Division of Parishes (*z*), and the cases of *Edgell v. Burnaby* (*a*), *Vaughan v. The South Metropolitan Cemetery Company* (*b*), *Champneys v. Arrowsmith* (*c*), *Cronshaw v. The Wigan Burial Board* (*d*), *Bowyer v. Stantial* (*e*), *Hughes v. Lloyd* (*f*), *Wood v. The Burial Board of Haddingley* (*g*), there cited.

Fees under
the Cemet-
eries Clauses
Act.

By 10 & 11 Vict. c. 65, the following provisions are made with respect to payments to incumbents of parishes or ecclesiastical districts, and to parish clerks, in compensation for their fees.

Payments to
incumbents of
parishes from
which bodies
are brought.

Sect. 52. "The company shall, on the burial of every body within the consecrated part of the cemetery, pay to the incumbent for the time being of the parish or ecclesiastical district from which such body shall have been removed for burial such sums, if any, as shall be prescribed for that purpose in the special act."

Company
shall keep
account of
interments.

Sect. 53. "For ascertaining the amount of the payments, if any, to be made to the incumbents of the several parishes or

(*u*) *Spry v. Directors and Guardians of the Poor of St. Marylebone*, 2 Curt. p. 5.

(*v*) The Burial Laws Amendment Act, 1880, recognizes the right to fees, vide *infra*, p. 698.

(*x*) 16 M. & W. p. 716 (1847).

(*y*) *Nevill v. Bridger*, L. R., 9 Ex. p. 214.

(*z*) Part IX., Chap. VI.

(*a*) 8 Ex. p. 788.

(*b*) 1 J. & H. p. 256.

(*c*) L. R., 3 C. P. p. 107.

(*d*) L. R., 8 Q. B. p. 217: et vide *infra*, p. 684.

(*e*) 3 Ex. D. p. 315.

(*f*) 22 Q. B. D. p. 157.

(*g*) (1892) 1 Q. B. p. 713.

districts aforesaid the company shall cause books to be kept, and entries to be made therein of the names of all persons whose bodies are buried within the consecrated part of the cemetery, and the names of the parishes or districts from which such bodies respectively have been removed and the manner of their burial within the cemetery, (distinguishing whether in a place of exclusive burial or otherwise), with the date of such burial; and such books shall be at all reasonable times open to inspection of the incumbents for the time being of the said several parishes or districts, or any person employed by them, without fee or reward."

Sect. 54. "The company shall on the 25th of March and 29th September in each year, or within one month after each of the said days, deliver to the person who is the incumbent of any parish or ecclesiastical district on that day, or to his executors or administrators, on demand made within the said month, an account of the sums, if any, payable in respect of bodies removed for burial within the consecrated part of the cemetery as aforesaid from such parish or ecclesiastical district during the half-year next preceding the said 25th of March or 29th of September, as the case may be."

Account of payments due to incumbents of parishes to be rendered half-yearly.

Sect. 55. "The sums payable by virtue of the special act shall be paid half-yearly on the 25th of March and the 29th of September, or within one month afterwards, to the persons who are the incumbents of the parishes or ecclesiastical districts in respect of which the same are payable on such 25th of March and 29th of September respectively, or the executors or administrators of such incumbents; (that is to say,) such sums as accrue between the 29th of September and 25th of March following, shall be paid to the person who is the incumbent on the 25th of March, and such sums as accrue between the 25th of March and the 29th of September following, shall be paid to the person who is the incumbent on the 29th of September; and if any such sums be not paid to the party entitled to receive the same within the period hereinbefore limited for the payment thereof, such party may recover the same, with full costs, by action of debt or on the case, in any court having competent jurisdiction."

Fees to be paid to incumbents of parishes half-yearly.

Sect. 56. "If any incumbent of any parish or district in respect of which sums are payable by the company by virtue of the special act ceases to be incumbent, by cession, death, or otherwise, between the said two half-yearly days of payment, such incumbent shall be entitled to receive so much of the sum payable at the half-yearly day which happens next after he ceases to be incumbent as has accrued from the last preceding half-yearly day, or from the time when such incumbent became first entitled to receive the fruits of his living, as the case may require, up to the day at which he ceased to be incumbent, and the incumbent of any parish or district who receives from the company any sum to a part of which any preceding incumbent is entitled under the provisions herein contained shall pay such

Payment to be made to the incumbent for the time being, who is to account with his predecessor.

part to him, his executors or administrators, accordingly; and the company shall not be answerable to any person, other than the actual incumbent for the time being, for the payment of any sums by virtue of this or the special act."

Company to pay parish clerks the compensation mentioned.

Sect. 57. "The company shall, on the burial of every body within the consecrated part of the cemetery, except where the body is buried at the expense of any parish or ecclesiastical district, or union of parishes for the relief of the poor, pay to the parish clerk of the parish or ecclesiastical district from which such body has been removed for burial, if he held the office of parish clerk of such parish or ecclesiastical district at the time of the passing of the special act, but not otherwise, such sum, if any, as shall be prescribed for that purpose in the special act."

Fees under 15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134.

By 15 & 16 Vict. c. 85 (extended to towns generally by 16 & 17 Vict. c. 134), the following provisions for compensation are made when churchyards are closed under their enactments.

By sect. 32, which has been already cited at length (*h*), every incumbent ministering in a burial ground provided by a burial board, and the clerk and sexton, shall be entitled to the same fees as if the ground were the parish churchyard.

Fees to be paid for burials in consecrated part of burial ground.

Fees for exclusive rights and for monuments.

Sect. 33. "Any burial board, under such restrictions and conditions as they think proper, may sell the exclusive right of burial, either in perpetuity or for a limited period, in any part of any burial ground provided by such board, and also the right of constructing any vault or place of burial with the exclusive right of burial therein in perpetuity or for a limited period, and also the right of erecting and placing any monument, grave-stone, tablet, or monumental inscription in such burial ground; but there shall be payable to the incumbent or minister of the parish out of the fees or payments to be paid in respect of any rights acquired under this enactment in the consecrated part of such burial ground (in lieu of the fees or sums which he would have been entitled to on the grant of the like rights in the burial ground of his parish) such fees or sums as shall be settled and fixed by the vestry with the approval of the bishop of the diocese, or if no such fees or sums shall have been so settled, then such fees as he would by law or custom have been entitled to on the grant of the like rights in the burial ground of his parish."

Fees to be divided among incumbents entitled.

Sect. 35. "Where at the time of the discontinuance of interment in any burial ground the fees in respect of burials therein are divided between the incumbent of the parish and the incumbent of any district parish or other ecclesiastical district, each incumbent shall have the same proportion of the fees in the burial ground to be provided under this act, as he was entitled to in respect of interments in the old burial ground."

Payment in certain cases

Sect. 36. "Where fees or any portion of fees payable on

(*h*) Vide *supra*, p. 660.

interments, or for any monument, gravestone, tablet, or monumental inscription in the burial ground of any parish for which a burial ground is provided alone or jointly with any other parish or parishes under this act, are by law or custom payable to the churchwardens of any parish, or to trustees or other persons, for or towards the payment of any annuity or stipend to the incumbent or minister, or any other parochial purpose, or the discharge of any debt or liability, such fees or portion of fees shall be payable in the burial ground to be provided as aforesaid for such parish under this act, and shall be received by the burial board and paid to the parties entitled to receive the same (i); and where fees or payments have been received on interments, or for any monument, gravestone, tablet, or monumental inscription, in the burial ground of any such parish by any such churchwardens, or by trustees or other persons, for the purpose of discharging any periodical payment or other liability, it shall be lawful for the burial board, upon the request of such churchwardens, trustees, or persons, to pay from time to time, out of the fees and moneys received by them on account of such parish, such amount as may be necessary for discharging such periodical payment or liability."

to churchwardens, trustees, &c.

Sect. 37. "It shall be lawful for the vestry of any parish from time to time, if they think fit, with the consent of the bishop of the diocese, to revise and vary the fees payable to the incumbent, clerk, and sexton, and other persons and bodies respectively, under the provisions of this act, or, with such consent as aforesaid, to substitute for the fees payable to such incumbent, clerk, and sexton, and other persons and bodies respectively, a fixed annual sum of such amount as to such vestry may seem just, to be payable by such periodical payments as such vestry may appoint; and in such last-mentioned case the fees which would otherwise be payable under this act to the incumbent, clerk, and sexton, and such other persons and bodies respectively, shall be paid to the burial board, and such fixed payments as aforesaid shall be paid by such board."

Power to vestry, with consent of bishop, to revise the fees to incumbent, &c., or to substitute a fixed payment.

Sect. 38. "The general management, regulation, and control of the burial grounds provided under this act shall, subject to the provisions of this act and the regulations to be made thereunder, be vested in and exercised by the respective burial boards providing the same; provided that any question which shall arise touching the fitness of any monumental inscription placed in any part of the consecrated portions of such grounds shall be determined by the bishop of the diocese."

Management to be vested in burial boards.

Sect. 39. "Where a burial ground is provided under this act for the common use of two or more parishes, in case any question arise among the incumbents of such parishes as to the performance of the burial service by a chaplain to be paid by means of contributions from such incumbents, or deductions from fees or

Arrangements between the incumbents of parishes.

(i) See *Scadding v. St. Pancras Burial Board*, L. R., W. N. 1889, p. 45.

sums payable to them, or otherwise touching the performance of service in the consecrated part of such ground, the bishop of the diocese shall from time to time confirm any arrangement which a majority, or, in case of equal numbers, one half of the incumbents shall approve, and such arrangement so confirmed shall be binding upon all the parties concerned."

Where fees are charged with payment of stipend to minister.

Sect. 50. "Where under any local act fees on interments in any burial ground of any parish in the metropolis are payable to the churchwardens of such parish, or to any trustees or other persons, for the purpose of enabling them to pay an annuity or stipend to the incumbent or minister, the fees which under this act, or any act relating to any cemetery company, would on the interment in the cemetery of any company of any body brought from such parish, be payable to such incumbent or minister, shall be payable to the said churchwardens, trustees, or persons, and any surplus of such fees which may remain in their hands after payment of such annuity or stipend shall be paid to such incumbent or minister."

20 & 21 Vict. c. 35.
London.

By 20 & 21 Vict. c. 35, all these provisions, except those contained in sect. 39 of 15 & 16 Vict. c. 85, are repealed as to the city of London and the liberties thereof; and special enactments are made instead.

17 & 18 Vict. c. 87.
Council of borough to have power of burial board in certain cases.

By 17 & 18 Vict. c. 87, s. 10, the powers of settling and fixing the fees or sums to be payable to the incumbent or minister, and of revising or varying the sums payable to the incumbent, clerk and sexton and other persons and bodies, and of substituting for such fees fixed annual sums, by sects. 33 and 37 of the last-mentioned act given to the vestry, and exercisable with the approval or consent of the bishop of the diocese, as therein mentioned, shall with respect to fees and sums arising in or from any burial ground provided under this act by the council of any borough be transferred to such council, and be exercisable with the like approval or consent (*k*).

19 & 20 Vict. c. 104.
Ecclesiastical districts.

By 19 & 20 Vict. c. 104, s. 32, for the purposes of the acts concerning or regulating the burial of the dead, every parish created under it or under 6 & 7 Vict. c. 37, or 7 & 8 Vict. c. 94, shall be held to be an ecclesiastical district within the meaning of the said acts.

Clerks and sextons may do their offices in burial grounds, and earn fees.

In the case of *Gell v. The Mayor, &c. of Birmingham* (*l*), it was holden that, under 15 & 16 Vict. c. 85, and 16 & 17 Vict. c. 134, parish clerks and sextons are entitled to perform, when necessary, the same functions and duties, and receive fees therefor, in respect of the burials of parishioners and inhabitants of the parishes of which they are clerks and sextons in the new burial grounds provided by burial boards under these acts, and the burial boards cannot deprive them of such fees by appointing other persons to do their duties. Nor can they maintain tres-

(*k*) See also 20 & 21 Vict. c. 81, (*l*) 10 L. T., N. S. p. 497.
s. 5.

pass against the sexton or his lawful deputy for entering upon the burial ground to dig the grave and toll the bells under the 67th Canon (*m*).

In the case of *Hornby v. The Burial Board of Toxteth Park* (*n*), upon the construction of the general and local burial acts, the incumbents of the several churches within the district of Toxteth Park were holden not to be entitled, either collectively or individually, to any of the fees paid for burials in the Toxteth Park Cemetery, upon the ground that none of those churches had burial grounds attached to them in which the persons dying within the district would have been buried, as of right, if it had not been for the existence of the Toxteth Park Cemetery.

Rights of incumbents where no previous churchyard.

But in *Stewart v. The West Derby Burial Board* (*nn*), the incumbent of West Derby was holden entitled and bound to perform the burial service over any of his parishioners buried in the consecrated part of the burial ground, provided in his parish by a burial board, though the parish of West Derby had never had a churchyard.

In *Day v. Peacock* (*o*), where prior to the act 15 & 16 Vict. c. 85, a township, which was a parish within the meaning of the interpretation clause of the act, was divided into ecclesiastical districts with separate burial grounds, and afterwards a burial ground was provided under the act for the whole township, it was held that each incumbent of such district was entitled to the burial fees in respect of the burial service performed by him in the burial ground provided under the act to which he would have been entitled before the act if the body had been buried in the burial ground attached to his district.

Rights where previous churchyards.

By 20 & 21 Vict. c. 81, s. 5, "The vestry, or meeting in the nature of a vestry, of any parish, new parish, township, or other district not separately maintaining its own poor, and which has had no separate burial ground, may appoint a burial board; and such vestry or meeting, and the burial board appointed by it, shall exercise and have all the powers which they might have exercised and had under the said acts, and this act, if such parish, new parish, township, or district had had a separate burial ground before the passing of" 18 & 19 Vict. c. 128: "Provided always, that all the powers of any other vestry, or meeting and burial board, if any, shall then cease and determine, so far as relates to such parish, new parish, township, or district as aforesaid; and until a burial ground shall be so provided as aforesaid and consecrated for any new parish or district created or to be created pursuant to the provisions of" 6 & 7 Vict. c. 37, 7 & 8 Vict. c. 94, 19 & 20 Vict. c. 104, "or any or either of them, and

20 & 21 Vict. c. 81.
Districts not fully parochial may have burial boards.

Until burial ground made for new parish, incumbent may

(*m*) See *Burial Board of St. Margaret's Rochester v. Thompson*, 19 W. R. p. 892; 40 L. J., N. S., C. P. p. 213.

(*n*) 31 Beav. p. 52; 8 Jur., N. S. p. 531.

(*nn*) 34 Ch. D. p. 314.

(*o*) 18 C. B., N. S. p. 702; 34 L. J., C. P. p. 225.

officiate and have fees in any burial ground for which his district pays rates.

Proviso for old incumbents, clerks and sextons.

Act applies when district becomes separate parish.

Application to sextons.

to which the said acts or any or either of them may apply, the incumbent of such new parish or district (if any burial ground has been or shall be provided under the herein recited acts for the burial of the dead, or any or either of them for any parish or parishes out of rates to which such new parish or district or any part thereof shall have contributed, or contribute, or be liable), shall, with respect to the burial in such last-mentioned burial ground of the remains of the parishioners or inhabitants of such new parish or district, or of such part thereof as shall have contributed or contribute as aforesaid, as the case may be, perform the same duties and have the same rights, privileges, and authorities, and be entitled to the same fees, and also the clerk and sexton of such new parish or district shall, when necessary, respectively perform the same duties, and be entitled to the same fees, in respect of such burials, as if the said burial ground were exclusively the burial ground of such new parish or district, subject nevertheless to all provisions to which the incumbents, clerks, and sextons of original parishes are respectively subject in and by the said burial acts, or any or either of them: Provided also, that nothing herein contained shall affect the rights or privileges of any existing incumbent, clerk, or sexton without the consent of such incumbent, clerk, or sexton respectively."

In the case of *Cronshaw v. The Wigan Burial Board* (*p*), where a church had been built and had a district assigned to it under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, and authority was given to perform baptisms, marriages, and burials in the new church, and the fees therefor were to be received by the incumbent of the new church, it was holden by the Exchequer Chamber that the district assigned to the new church became a separate and distinct parish for ecclesiastical purposes under 19 & 20 Vict. c. 104, s. 14, so that upon the death of the clerk, who was incumbent of the mother church at the time of the assignment of the district, the incumbent of the district had a right under sect. 5 of 20 & 21 Vict. c. 81, to perform the burials of his parishioners within the cemetery provided by the burial board for the whole of the old parish, and to receive the fees on burials.

The same point was decided by the Queen's Bench in a case where an action was brought by a sexton (*q*).

In *White v. The Norwood Burial Board* (*r*), the sexton of the old parish was holden not to be entitled to fees, in similar circumstances.

(*p*) L. R., 8 Q. B. p. 217.

(*q*) *Ormerod v. Blackburn Burial*

Board, 21 W. R. p. 539.

(*r*) 16 Q. B. D. p. 58.



SECT. 5.—*Mortuaries.*

Closely analogous to burial fees are mortuaries.

A mortuary seems to have been originally an oblation made at the time of a person's death. In the Saxon times there was a funeral duty to be paid, which was called *pecunia sepulchralis*, and *symbolum animæ* or the soul-shot, which was required by the Council of Ænham, and enforced by the laws of King Canutus, and was due to the church which the party deceased belonged to, whether he was buried there or not (s).

Old law as to mortuaries.

Dr. Stillingfleet makes a distinction between mortuaries and corse presents: the mortuary, he says, was a right settled on the church upon the decease of a member of it; and a corse present was a voluntary oblation usually made at funerals (t).

And it seems that in ancient times a man might not dispose of his goods by his last will and testament without first assigning therein a sufficient mortuary to the church. And this, in a constitution of Archbishop Winchelsea, is called the principal legacy, so denominated (says Lindwood), because they who died did bequeath the best or the second best of their goods to God and the church, in the first place, and before other legacies (u).

And in another constitution of the same archbishop it is enjoined, that if a person at the time of his death have three or more quick goods, the first best shall be given to him to whom it is due (that is, to the lord of the fee for a heriot), and the second best shall be reserved to the church where the deceased person received the sacraments while he lived (v).

And this was usually carried to the church with the dead corse. And Mr. Selden quotes an ancient record, where it is recited, that a horse was presented at the church the same day in the name of a mortuary, and that the parson received him according to the custom of the land and of holy church (x).

By 21 Hen. 8, c. 6, s. 1, "Forasmuch as question ambiguity and doubt is chanced and arisen upon the order manner and form of demanding, receiving and claiming of mortuaries, otherwise called corse presents, as well for the greatness and value of the same, which, as hath been lately taken, is thought over-excessive to the poor people and other persons of this realm, as also for that such mortuaries or corse presents have been demanded and levied for such as at the time of their death have had no property in any goods or chattels, and many times for travelling and wayfaring men in the places where they have fortun'd to die; to the intent that all doubt, contention and uncertainty herein may be removed, and as well the generality of the king's people therein remedied, as also the parsons, vicars, parish priests, curates and

21 Hen. 8,
c. 6.

Limitations
of mortuaries
by statute.

(s) 1 Stillingfleet Eccl. Cas. p. 245.

(t) Ibid. pp. 248, 249.

(u) Lind. p. 196.

(v) Ibid. p. 184.

(x) Selden on Tithes, ch. 10, p. 287.

others having interest in such mortuaries and corse presents indifferently provided for, it is enacted, that "no parson, vicar, curate, nor parish priest, nor any other spiritual person, nor their farmers, bailiffs, nor lessees, shall take, receive or demand of any person or persons within this realm, for any person or persons dying within the same, any manner mortuary or corse present, nor any sum or sums of money nor any other thing for the same more than is hereafter mentioned, nor also shall convent or call any person or persons before any judge spiritual for the recovery of any such mortuaries or corse presents, or any other thing for the same, more than is hereafter mentioned; on pain to forfeit for every time so demanding receiving taking or conventing or calling any such person or persons before any spiritual judge so much in value as they shall take above the sum limited by this act, and over that 40s. to the party so grieved contrary to this act," to be recovered by action of debt.

Scale fixed.
No double
payments.

Sect. 2. "First it is ordained, established and enacted that no manner of mortuary shall be taken or demanded of any person whatsoever he be, which at the time of his death hath in moveable goods under the value of ten marks; also that no mortuary shall be given, asked or demanded henceforth from any manner of person but only in such place where heretofore mortuaries have been used to be paid and given, and in those places none otherwise but after the rate and form hereafter mentioned: nor that any person pay mortuaries in more places than one, that is to say, in the place of their most dwelling habitation, and there but one mortuary: nor any parson vicar curate parish priest or other, shall, for any person dying or dead, and being at the time of his death of the value in moveable goods of ten marks or more, clearly above his debts paid, and under the sum of 30*l.*, take for a mortuary above 3*s.* 4*d.* in the whole. And for a person dying or dead, being at the time of his death of the value of 30*l.* or above, clearly above his debts paid, in moveable goods, and under the value of 40*l.* there shall no more be taken or demanded for a mortuary than 6*s.* 8*d.* in the whole; and for any person dying or dead, being at the time of his death of the value in moveable goods of 40*l.* or above, to any sum whatsoever it be, clearly above his debts paid, there shall be no more taken, paid or demanded for a mortuary than 10*s.* in the whole."

What classes
of persons
exempt.

Sect. 3. "Provided always, that for no woman being covert, baron, nor child, nor for any person not keeping house, any manner mortuary be paid . . . nor also for any wayfaring man or other that dwelleth not nor maketh residence in that place where they shall happen to die, but that the mortuary of such wayfaring persons be answerable, in places where mortuaries be accustomed to be paid in manner and form and after the rate before mentioned, and none otherwise, in the place or places where such wayfaring persons at the time of their death had their most habitation, house and dwelling places, and no where else."

Sect. 4. "Provided alway, that it shall be lawful to all manner of parsons vicars curates parish priests and other spiritual persons, to take and receive any manner sum of money or other thing, which by any person dying shall fortune to be disposed given or bequeathed unto them, or any of them, or to the high altar of the church."

Proviso as to gifts from persons dying.

Sect. 5. "And no mortuaries nor corse presents, nor any sum or sums of money or other thing for any mortuary or corse present, shall be demanded, taken, received, or had in the parts of Wales, nor in the marches of the same, nor in the town of Berwick, nor marches of the same, but only in such parts and places of the same where mortuaries have been accustomed to be paid; and in those places no mortuaries or corse presents, nor any other thing for mortuary or corse present, from henceforth shall be demanded, taken, received, or had, but only after the form, order, and manner above specified in this present act, and none otherwise, nor of any other person or persons than is limited by the present act, upon the pain above contained in this present act."

No mortuaries in Wales or Berwick.

Sect. 7. . . . "Provided also, that in such places where mortuaries have been accustomed to be taken of less value than is aforesaid, no person shall be compelled to pay in such place any other mortuary, or more for any mortuary than hath been accustomed; nor that any mortuary in such place shall be demanded, taken, received, or had of any person or persons exempt by this act, nor in any wise contrary to this act, upon the pain afore limited."

Where customary payments lower, scale not to be in force.

The same section of the act preserved the right of the Bishops of Bangor, Llandaff, St. Davids, and St. Asaph, and of the archdeacon of Chester to take mortuaries of "the priests within their dioceses and jurisdictions" (y). These rights were abolished by 13 Anne, c. 6, as to the above four dioceses, and by 28 Geo. 2, c. 6, as to the archdeacon of Chester.

Certain mortuaries preserved by act afterwards abolished.

Some special customs in the archdeaconry of Richmond in the county of York, by virtue of which the parochial clergy used to take of "every person when he dieth, in the name of a pension or of a portion, sometime the ninth part of all his goods and chattels, and sometime the third part, to the open and manifest impoverishing of most part of the king's poor subjects inhabiting and deceasing within the same," were abolished by 26 Hen. 8, c. 15.

26 Hen. 8, c. 15.

By the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, "if a parson demand mortuaries, in places where a mortuary hath been used to be given," in all such cases "the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

13 Ed. 1, st. 4. Mortuaries recoverable in ecclesiastical court.

Sir Simon Degge was of opinion, that an action also will now lie upon the aforesaid statute 21 Hen. 8, c. 6. But that statute

(y) See *Hinde v. Bp. of Chester*, Cro. Car. p. 237.

plainly supposes that the recovery of the money shall be solely in the spiritual court, as the recovery of the mortuary was before (z).

Subject to
trial at law
if custom
disputed.

In the case of *Johnson v. Oldham*, in 12 Will. 3, a prohibition was moved for, to be directed to the spiritual court, to stay a suit there for a mortuary, upon a suggestion of the statute (21 Hen. 8, c. 6), and that there was no custom for the payment of it; and it was urged, that no mortuary was due but by custom, and therefore the custom here being denied, they ought not to proceed in the spiritual court. Against which, it was argued, that the statute has saved the jurisdiction to the spiritual court, where mortuaries have been usually paid; besides, they ought first to plead in the spiritual court, that there is not any such custom; and then, upon refusal to admit the plea there, is the time to move the court of King's Bench, and not before: but here they have not pleaded this matter in the spiritual court. And by Holt, Chief Justice: A prohibition cannot be granted, without a denying of the custom in the spiritual court, which is not done here. And afterwards the rule was discharged by the court (a).

But if the custom be denied, and the spiritual court will not admit that plea, a prohibition will go; and they shall not try the custom there (b).

But where the custom of paying a mortuary was owned, and the only question in the spiritual court was, whether it belonged to the vicar or impropriator, a prohibition in such a case has been denied (c).

Whether
recoverable in
temporal
court.

In the case of *Torrent v. Burley*, in 13 Geo. 1 (d), in the Exchequer, a bill was brought to discover, whether the defendant's husband died worth 40*l.* so as to be liable to pay the plaintiff a mortuary; and praying relief. Upon answer admitting assets, but denying the custom, the plaintiff went into a proof of his right; and several witnesses were examined on both sides. And at the hearing, the bill was dismissed with costs, as to the relief, because that was properly at law, or in the spiritual court; and, in a bill against one person only, the right could not be established.

In *Manby v. Curtis* (e) it was said to be a moot question whether mortuaries can be recovered at law, and whether they must not be sued for in the spiritual court, under the foregoing statute of 21 Hen. 8 c. 6; and that it would be difficult to say that they would be recoverable in a court of equity (f).

Or before
justices.

In *Ayrton v. Abbott* it was holden that mortuaries are not within 7 & 8 Will. 3, c. 6, s. 2, which authorizes justices of the

(z) Wats. c. 53, p. 598.

(a) 1 Ld. Raym. p. 609; 12 Mod. p. 416.

(b) *White's case*, Cro. Eliz. p. 151.

(c) *Marke v. Guilbert*, 1 Keb. p. 919.

(d) Stra. p. 715.

(e) 2 Price, p. 284; 3 Eag. & Yo. p. 733.

(f) See also 1 Eagle on Tithes, p. 420.

peace to adjudicate upon complaints of subtraction of small tithes, offerings, oblations and obventions (*g*).

By 13 Eliz. c. 5, all alienations of lands or goods to defraud creditors and others of their just debts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, shall (as against such claimants) be utterly void and of none effect.

Fraudulent alienations to defeat mortuaries void.

By the first Tithe Commutation Act, 6 & 7 Will. 4, c. 71, s. 90, it is enacted that: "Nothing in this act contained, unless by special provision to be inserted in some parochial agreement, and specially approved by the commissioners, in which case the same shall be valid, shall extend to any . . . mortuaries."

As to commutation of mortuaries.

But by 2 & 3 Vict. c. 62, s. 9, it is enacted that "it shall be lawful at any time before the confirmation of any apportionment after a compulsory award in any parish, for the landowners and titheowners, having such interest in the lands and tithes of such parish as is required for the making of a parochial agreement, to enter into a parochial agreement for the commutation of . . . mortuaries" (*h*).



SECT. 6.—*Protection of the Dead.*

Funeral expenses, according to the degree and quality of the deceased, are to be allowed of the goods of the deceased, before any debt or duty whatsoever (*i*).

Funeral charges.

The carcase that is buried belongs to no one, but when buried in consecrated ground is subject to ecclesiastical cognizance, if abused or removed (*k*); and if not buried in consecrated ground is under the protection of the temporal courts (*l*). Though, as Lord Coke says, a corpse is *nullius in bonis*; yet taking up a dead body, though for the purpose of dissection, is an indictable offence at law, as an act highly indecent and *contra bonos mores* (*m*). 1 Jac. 1, c. 12, made it felony to steal dead bodies for the purposes of witchcraft, but is repealed by 9 Geo. 2, c. 5.

Protection of dead bodies.

In the Lent assizes holden at Leicester, in 11 & 12 Jac. 1, the case was, one William Haynes had digged up the several graves of three men and one woman in the night, and had taken their winding sheets from their bodies, and buried them again, and it was resolved by the justices at Serjeants' Inn, in Fleet Street, that the property of the sheets remained the owner's, that is, in him who had the property therein, when the dead body was wrapped therewith, for the dead body was not capable of it, and that the taking thereof was felony (*n*).

Stealing shrouds.

(*g*) 14 Q. B. p. 1.

(*h*) Vide infra, Part V., Chap. III.

(*i*) 3 Inst. p. 202.

(*k*) 3 Inst. p. 203.

(*l*) *Foster v. Dodd*, per Byles, J., L. R., 3 Q. B. p. 67; *Reg. v. Jacobson*, 14 Cox, C. C. p. 522.

(*m*) *Rex v. Lynn*, 2 T. R. p. 733.

(*n*) *Haynes' case*, 12 Co. p. 113.

Bodies not
to be removed
without a
faculty or
lawful
authority.

And a corpse once buried [in consecrated ground] cannot be taken up or removed without licence from the ordinary (o).

That is, to be buried in another place, or the like: but in the case of a violent death the coroner may take up the body for his inspection if it is interred before he comes to view it.

In the case of *The Vestry of St. Pancras v. The Vicar and Churchwardens of the Parish of St. Martin-in-the-Fields* (p), it appeared that in 1854 a local act of parliament was obtained to enable the granting of building leases of a certain portion of the cemetery, belonging to the parish of A., which had not previously (it was then supposed) been used for the purposes of interment, and which was particularly described in the schedule annexed to the act. The trustees, under the powers of the act, contracted for the sale of the ground so described in the schedule; but the contractor, on making excavations therein, found some coffins and remains of bodies. In June, 1858, on the representation that these did not exceed twenty in number, a licence or faculty issued from the Consistory Court of London for the removal of such coffins and remains, in order that they might be decently and properly interred in the inclosed part of the cemetery. Subsequently, without any further authority, between 400 and 500 more coffins were disinterred; and it was holden that the vicar and churchwardens, to whom the faculty had been directed, had exceeded the powers confided to them by the ordinary; that they must return the faculty into the registry, be admonished to re-inter decently all the remains that had been disinterred, and to refrain from disturbing the remains of the dead which had been interred in any portion of the cemetery; and that they must pay the costs of the proceedings.

In the case of *Sarah Pope* (q), a faculty to exhume a body for the purpose of discovering its identity, was granted by the Consistory Court of London.

It was holden in *Reg. v. Sharpe* (r), that it is a misdemeanor to remove without lawful authority a coffin from a burial ground belonging to Protestant Dissenters, though the object was to bury it in a consecrated churchyard.

20 & 21 Vict.
c. 81.

Licence from
Secretary of
State.

By 20 & 21 Vict. c. 81, s. 25, "Except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the ordinary for that purpose, it shall not be lawful to remove any body, or the remains of any body, which may have been interred in any place of burial without licence under the hand of one of her Majesty's Principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence; and any person who shall remove such body or remains, contrary to this enactment, or who shall neglect to observe the precautions prescribed as the condition of the licence for removal, shall, on

(o) Gibs. p. 454. Vide supra,
pp. 657, 664.

(p) 6 Jur., N. S. p. 540.

(q) 15 Jur. p. 614 (1851).

(r) 1 Dears. & B. C. C. p. 160.

summary conviction before any two justices of the peace, forfeit and pay for every such offence a sum not exceeding ten pounds.”

A faculty has been refused where the object was that the body should be taken up and cremated (s).

Whether for cremation.

Faculties have been granted for the removal of dead bodies from churches and churchyards on sanitary grounds (t).

Removal on sanitary grounds.

SECT. 7.—*Monuments of the Dead.*

Lord Coke says, “Concerning the building or erecting of tombs, sepulchres, or monuments for the deceased in church, chancel, common chapel, or churchyard, in convenient manner, it is lawful; for it is the last work of charity that can be done for the deceased, who while she lived was a lively temple of the Holy Ghost, with a reverend regard and Christian hope of a joyful resurrection. And the defacing of them is punishable by the common law, as it appeareth in the book of the 9 Edw. 4, c. 14 (the *Lady Wiche’s Case*, wife of Sir Hugh Wiche), and so it was agreed by the whole court, Mich. 10 Jac. 1, in the Common Pleas, between *Correen* and *Pym*. And for the defacing thereof, they that build or erect the same shall have the action during their lives (as the Lady Wiche had in the case of the 9 Edw. 4); and after their deceases, the heir of the deceased shall have the action. But the building or erecting of the sepulchre, tomb, or other monument, ought not to be to the hindrance of the celebration of divine service” (u).

Lord Coke’s opinion.

And again Lord Coke says, “If a nobleman, knight, esquire, &c., be buried in a church, and have his coat armour and pennions with his arms, and such other ensigns of honour as belong to his degree or order, set up in the church, or if a gravestone or tomb be laid or made, &c., for a monument of him, in this case, albeit the freehold of the church be in the parson, and that these be annexed to the freehold, yet cannot the parson or any take them or deface them, but he is subject to an action to the heir and his heirs in the honour and memory of whose ancestor they were set up” (x).

But Dr. Watson says, this is to be understood of such monuments only as are set up in the aisles belonging to particular persons, or if they are set up in any other part of the church, he supposes it to be understood that they were placed there with the incumbent’s consent (y).

Dr. Watson.

And Dr. Gibson saying thereupon, says thus: “Monuments, coat armour, and other ensigns of honour, set up in

Dr. Gibson.

(s) *Re Dixon*, (1892) P. p. 386.

(t) *Vicar, &c. of Aldgate v. Parishioners*, (1892) P. p. 161; *Rector, &c. of St. Helens v. Parishioners*, *ibid.* p. 259; *Rector, &c. of St. Mary-at-Hill v. Parishioners*, *ibid.*

p. 394; *Rector, &c. of St. Michael Bassishaw v. Parishioners*, (1893) P. p. 233. Vide *supra*, p. 664.

(u) 3 Inst. p. 201.

(x) 1 Inst. p. 18.

(y) Wats. c. 39, p. 398.

memory of the deceased, may not be removed at the pleasure of the ordinary or incumbent. On the contrary, if either they or any other person shall take away or deface them, the person who set them up, shall have an action against them during his life, and after his death the heir of the deceased shall have the same, who (as they say) is inheritable to arms, &c., as to heir-looms; and it avails not, that they are annexed to the freehold, though that is in the parson. But this, as I conceive, is to be understood with one limitation, If they were first set up with consent of the ordinary; for though (as my Lord Coke says) tombs, sepulchres or monuments may be erected for the deceased in church, chancel, &c., in convenient manner, the ordinary must be allowed the proper judge of that conveniency, inasmuch as such erecting (for so he adds) ought not to be to the hindrance of the celebration of divine service; and if they are erected without consent, and (upon inquiry and inspection) be found to the hindrance of divine service, it will not, I hope, be denied that in such case the ordinary has sufficient authority to decree a removal without any danger of an action at law" (y).

Palmer v. Bp. of Exeter.

And in *Palmer v. The Bishop of Exeter* (z), in 10 Geo. 1, it was holden that the ordinary may bring a suit to have monuments set up without his consent removed.

Whether any fee for erecting monuments.

Whether a fee is due to the incumbent for erecting a grave-stone or monument in the churchyard has been questioned by some. It seems to be an argument in favour of the incumbent, that although it is necessary to bury the dead, yet it is not necessary to erect monuments; and after the soil has been broken for interring the dead, the grass will grow again, and continue beneficial in the incumbent; but after the erection of a monument, there ceases to be any further produce of the soil in that place. And if the incumbent's leave is necessary for the erecting a monument, it seems that he may prescribe his own reasonable terms; or if an accustomed fee has been paid, that such custom ought to be observed. In *Bardin v. Calcott* (a), where the office of the judge was promoted, Lord Stowell said, "Ancient Custom often annexes fees for erecting a stone or anything else by which the grave may be protected and the memory of the person interred preserved. It is no general common law right; but custom will interfere, and where it is shown to be customary such a practice will be supported" (b).

Monuments to be erected by faculty.

In the same case he said, "As to buildings of height the authority is reserved to the ordinary, and permission ought not to be granted without his authority in some manner interposed. The proper mode, strictly speaking, is to apply to the ordinary for a faculty, who calls on all persons having a right to show cause why it should not be done, and hears and determines on

(y) *Gibs.* pp. 453, 454. See also *Degge*, pt. 1, c. 12.

(z) *Nom. Palmer v. Episcopum Exon.*, *Stra.*, p. 576.

(a) 1 *Consist.* p. 14.

(b) In consecrated grounds provided by burial boards special statutory provision is made for the incumbent's fees by 15 & 16 Vict. c. 85, s. 33. Vide *supra*, p. 680.

the force of any objections that be made against it. The third Institute leaves the matter at large; but all commentators say that the Ordinary is to judge of the convenience of allowing tombs or monuments to be erected, and that if done without his consent, he has sufficient authority to decree their removal." There is a difference (he said) between a flat stone and that of a building of greater height.

In *Maidman v. Malpas* (c), also, it is laid down by the same learned judge, that the permission of the ordinary is requisite before a monument can properly be erected. "It is to his care that the fabric of the church is committed, that it shall not be injured or deformed by the caprice of individuals. The consent of the incumbent is usually taken on such occasions, and especially of the rector for monuments in the chancel. A faculty likewise is required, though it is frequently omitted, under the confidence reposed in the minister, and the ecclesiastical court is not eager to interpose. But when cases are brought before it, it is necessary to inquire whether the thing is proper to be done, and whether the consent of the incumbent has been obtained." In *Beckwith v. Harding* (d) it was said, that a custom for the churchwardens of a parish to set up monuments, &c. in a church, without either the consent of the rector or ordinary, was bad. In *Seager v. Bowle* (e), Dr. Addams's note says, the court may be taken to have expressed its final judgment, that no practice can absolutely legalize the erection of a monument without a faculty.

Power of
ordinary.

It is observed, too, in *Maidman v. Malpas*, cited above, that a monument, once erected, cannot be taken down without the consent of the ordinary. In *Hopper v. Davis* (f) it is said the ordinary may order a monument to be taken down, if placed inconveniently; but the court there intimates that the incumbent's consent will usually satisfy the ordinary.

May not be
taken down,
unless
illegally
erected.

In *Sharpe and Sangster v. Hansard* (g), the court granted a faculty to lay flat upright head-stones and foot-stones, inserting a clause that no expense should fall on individuals. This was under particular circumstances. The plan had been adopted by the unanimous report of a committee, chosen by the vestry, and was opposed only by one individual, who failed in proving that it would be accompanied by any substantial inconvenience.

Laying
stones flat.

In *Bulwer v. Hase* (h), a rector was cited to show cause why the ordinary should not grant to a parishioner a faculty for stopping up a window in the church, against which it was proposed to erect a monument; to the granting of which the rector dissented; notwithstanding which the court below were proceeding to grant the faculty, with the consent of the ordinary. This was holden to be no ground for a prohibition, but mere

Grant of
faculty
ground for
appeal, not
for prohibi-
tion.

(c) 1 Consist. p. 205.

(d) 1 B. & Ald. p. 508.

(e) 1 Add. p. 541.

(f) 1 Lee, p. 640.

(g) 3 Hagg. Eccl. p. 335.

(h) 3 East, p. 217.

matter of appeal (*i*), if the rector's reasons for dissenting were improperly overruled.

Inscriptions
on tomb-
stones.

In *Keet v. Smith* the incumbent objected to the proposed inscription on a tombstone, and on application being thereupon made by the father of the deceased for a faculty, the chancellor of the diocese and the Court of Arches refused it; but the Privy Council, seeing nothing objectionable in the inscription, directed it to issue (*j*). The ordinary's power to regulate inscriptions on tombstones in cemeteries and in consecrated grounds provided by burial boards is specially assured by 10 & 11 Vict. c. 65, s. 51, and 15 & 16 Vict. c. 85, s. 38 (*k*).

Burial board
regulations.

Where a burial board had granted a widow space for a private grave in which her husband was subsequently interred, it was holden that the board could not by a subsequent regulation give itself the exclusive power of planting flowers, and exclude a gardener employed by the widow (*l*). But in a similar case where it had always been the practice of a board to refuse to allow glass shades and wire frames, the board was holden to be warranted in removing one, and the case previously cited was commented on as going very far (*m*). The analogy of the power of the ordinary over graves in consecrated grounds was much relied on in these cases. They are, therefore, important here as incidental to decisions on ecclesiastical law.

Action of
trespass for
removing a
tombstone.

The courts of common law will in some cases punish, as well as the ecclesiastical courts, the removal of a tombstone. In *Spooner v. Brewster* (*n*), trespass was maintained for taking away a tombstone from a churchyard, and obliterating an inscription made upon it, at the suit of the party by whom it was erected, although the freehold of the churchyard is in the parson; as the property in a tombstone vests in the person who erects it, or in the heirs of the deceased in whose memory it is set up.

Punishment
for the same
offence in
ecclesiastical
court.

It was laid down by Lord Stowell in *Hutchins v. Denziloe and Loveland* (*o*), that a churchwarden may be sued in the ecclesiastical court, if, without obtaining a faculty, he gives orders for the removal of a monument or a dead body.

Vaults in
churches and
churchyards.

The court will not compel by mandamus a rector to bury in a vault (*p*). A grant by a rector to an individual of the exclusive right of burial for himself, his family, his friends, in a vault under the church, if it can be made at all, must be by deed and not by parol, as it would be an easement arising out of land; but it would seem that no such grant can be made by the rector,

(*i*) That such an appeal will lie, see *Cart v. Marsh*, Stra. p. 1080.

(*j*) L. R., 4 Adm. & Eccl. p. 398; 1 P. D. p. 73. See *Breeks v. Woolfrey*, 1 Curt. p. 887; infra, p. 696.

(*k*) Vide supra, pp. 657, 681.

(*l*) *Ashby v. Harris*, L. R., 3 C. P. p. 523.

(*m*) *McGough v. Lancaster Burial Board*, C. A., 21 Q. B. D. p. 323.

(*n*) 10 Mo. p. 494; 3 Bing. p. 136; 2 C. & P. p. 34.

(*o*) 1 Consist. p. 172; see *Adlam v. Colthurst*, L. R., 2 Adm. & Eccl. p. 30.

(*p*) *Ex parte Blackmore*, 1 B. & Ad. p. 122.

but only permission accorded to bury there at each particular time. If such a grant can be granted at all, it must be by faculty to a parishioner, and annexed to a mansion within the parish (q).

In *Magnay v. The Rector, &c. of St. Michael (r)*, application was made for a faculty "setting apart, appropriating, and confirming a certain vault (with the entrance thereto), many years ago made or built of brick, under the north aisle, and extending under a pew, and next to the chancel of the parish church of St. Michael, Paternoster Royal, as and for a burial-place for the interment of the bodies of the said Christopher Magnay, and of his family for ever, exclusive of all others; and also for the removal of the corpses of the said Christopher Magnay, Jane Magnay, his former wife, and of his two sons respectively deceased, from the general vault in the said parish church, where the same now remain, into the said private vault, the same having never been hitherto appropriated." And there being no opposition the application was granted. Faculty for a vault.

The court observed,—"that the circumstances under which the present application was made, afforded a presumption that there was sufficient burial room in the parish to allow of this appropriation. . . . The faculty, however, must be limited, in the same manner as faculties for pews, 'to the use of the family as long as they continue parishioners and inhabitants.'"

In the observations as to sufficient burial room the court was referring to an earlier case (s) where the court said, that it would scruple to decree such a faculty, without being satisfied that it is not likely to be generally prejudicial to the parish, even though its issue be unopposed, either on the part of the parish or of that of any particular parishioner.

In *Rich v. Bushnell (t)*, the following points seem to have been established as to the lay rector's rights of erecting monuments, &c. in the chancel. Lay rector's rights as to the erection of vaults and tablets in the chancel.

1. That he is not entitled to erect a monument, or affix a tablet, or construct a vault, without the leave of the ordinary; for though the chancel is his freehold, it is subject to the use of the parishioners, the guardian of whose rights is the ordinary.
2. That he must satisfy the ordinary that these rights will not be impaired.
3. That the leave of the lay rector must precede the application for the faculty.
4. That the vicar has no power of interposing an absolute veto, but may show cause, against the issue of the grant. The vicar has no fee for interments in the chancel of common right. Vicar's rights.

It is doubtful (says Sir John Nicholl in the same case) whether the consent of the vicar is necessary to the construction of a vault, or to the affixing of a tablet even in the body of the church [that is when a faculty is granted], or whether he has in such a Vicar's rights in body of the church.

(q) *Bryan v. Whistler*, 2 M. & R. p. 318; 8 B. & C. p. 288. &c. of *Northfleet*, 3 Add. p. 14. See, however, *Re Sargent*, 15 P. D. p. 168.

(r) 1 Hagg. Eccl. p. 48.

(s) *Rosher v. The Churchwardens*, (t) 4 Hagg. Eccl. p. 164.

case a claim to a fee unless when established by a special custom. The learned judge also expressed his opinion that vaults were highly objectionable in the chancel or in the church, but that the affixing of tablets was rather to be favoured than discouraged.

SECT. 8.—*Prayers for the Dead.*

If a tombstone contain an improper uncanonical inscription, it may be removed.

Prayers for the dead not expressly forbidden by our church.

In college chapels.

In the cause of the office of the judge promoted by *Brecks v. Woolfrey*, Sir Herbert Jenner said, "It was not denied, nay it was admitted, that if the inscriptions were of the character attributed to them in the citation, namely,—'contrary to the articles, canons and constitutions, and to the doctrines and discipline of the Church of England,' no person had a right to erect a tombstone, with such inscriptions impugning the doctrines of the Church of England, and that a person so offending is liable to be punished, and the tombstone to be removed" (*u*). The inscription was, "Pray for the soul of J. Woolfrey;" and the judge decided in a very elaborate judgment that such an inscription was not illegal, as by no canon or authority of the church in these realms had the practice of praying for the dead been expressly prohibited, and the inscription on Bishop Barrow, in the cathedral of St. Asaph in 1680, "*O vos transeuntes in domum Domini, in domum orationis, orate pro conseruo vestro, ut inveniat misericordiam in die Domini*," was much relied upon both by the advocate for Woolfrey and the judge (*x*).

Elizabeth's Latin Prayer Book has prayers for the dead (*y*).

Prayers in the nature of prayers for the dead are used on special occasions in the chapels of some colleges at Oxford, and are, or were till lately, used at Trinity College, Dublin (*z*).

SECT. 9.—*The Burial Laws Amendment Act, 1880.*

43 & 44 Vict. c. 41.

After passing of act, notice may be given that burial will take place in churchyard or

The following are the material provisions of the Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41):—

Sect. 1. "Any relative, friend, or legal representative having the charge of or being responsible for the burial of a deceased person may give forty-eight hours notice in writing, indorsed on the outside 'Notice of Burial,' to, or leave or cause the same to be left at the usual place of abode of the rector, vicar, or other

(*u*) See *Keet v. Smith*, L. R., 4 Adm. & Eccl. p. 398; reversed on appeal, 1 P. D. p. 73.

(*x*) 1 Curt. p. 887. See *Egerton v. All of Odd Rode*, (1894) P. p. 15.

(*y*) See 1 Cardwell, Doc. Ann. p. 280.

(*z*) Irish Prayer Book of 1723. Vide *supra*, p. 467.

incumbent, or in his absence the officiating minister in charge of any parish or ecclesiastical district or place, or any person appointed by him to receive such notice, that it is intended that such deceased person shall be buried within the churchyard or graveyard of such parish or ecclesiastical district or place without the performance, in the manner prescribed by law, of the service for the burial of the dead according to the rites of the Church of England, and after receiving such notice no rector, vicar, incumbent, or officiating minister shall be liable to any censure or penalty, ecclesiastical or civil, for permitting any such burial as aforesaid. Such notice shall be in writing, plainly signed with the name and stating the address of the person giving it, and shall be in the form or to the effect of Schedule (A.) annexed to this act (a).

graveyard without the rites of the Church of England.

“The word ‘graveyard’ in this act shall include any burial ground or cemetery vested in any burial board, or provided under any act relating to the burial of the dead, in which the parishioners or inhabitants of any parish or ecclesiastical district have rights of burial; and in the case of any such burial ground or cemetery, if a chaplain is appointed to perform the burial service of the Church of England therein, notice under this act shall be addressed to such chaplain, but the same shall be given to or left at the office of the clerk of the burial board, if any, in whom any such burial ground or cemetery may be vested: Provided also, that it shall be lawful for the proprietors or directors of any proprietary cemetery or burial ground to make such byelaws or regulations as may be necessary for enabling any burial to take place therein in accordance with the provisions of this act, any enactment to the contrary notwithstanding.”

Sect. 2. “Such notice, in the case of any poor person deceased, whom the guardians of any parish or union are required or authorized by law to bury, may be given to the rector, vicar, or other incumbent in manner aforesaid, and also to the master of any workhouse in which such poor person may have died, or otherwise to the said guardians, by the husband, wife, or next of kin of such poor person, who, for the purposes of this act shall be deemed to be the person having the charge of the burial of such deceased poor person; and in any such case it shall be the duty of the said guardians to permit the body of such deceased person to be buried in the manner provided by this act.”

Paupers.

Sect. 3. “Such notice shall state the day and hour when such burial is proposed to take place, and in case the time so stated be inconvenient on account of some other service having been, previously to the receipt of such notice, appointed to take place

Time of burial to be stated, subject to variation.

(a) In the case of a consecrated ground belonging to a burial board, the board has no duty to see that the rector, vicar, &c. gets the notice; but it must not knowingly permit

burials where no such notice has been given: *Wood v. Burial Board of Headingley cum Burley*, (1892) 1 Q. B. p. 713.

in such churchyard or graveyard, or the church or chapel connected therewith, or on account of any byelaws or regulations lawfully in force in any graveyard limiting the times at which burials may take place in such graveyard, the person receiving the notice shall, unless some other day or time shall be mutually arranged within twenty-four hours from the time of giving or leaving such notice, signify in writing, to be delivered to or left at the address or usual place of abode of the person from whom such notice has been received or at the house where the deceased person is lying, at which hour of the day named in the notice, or (in case of burial in a churchyard, if such day shall be a Sunday, Good Friday, or Christmas Day) of the day next following, such burial shall take place; and it shall be lawful for the burial to take place, and it shall take place, at the hour so appointed or mutually arranged, and in other respects in accordance with the notice: Provided that, unless it shall be otherwise mutually arranged, the time of such burial shall be between the hours of ten o'clock in the forenoon and six o'clock in the afternoon if the burial be between the first day of April and the first day of October, and between the hours of ten o'clock in the forenoon and three o'clock in the afternoon if the burial be between the first day of October and the first day of April: Provided also, that no such burial shall take place in any churchyard on Sunday, or on Good Friday or Christmas Day, if any such day being proposed by the notice shall be objected to in writing for a reason assigned by the person receiving such notice."

Burial to
take place
accordingly.

Sect. 4. "When no such intimation of change of hour is sent to the person from whom the notice has been received, or left at the house where the deceased person is lying, the burial shall take place in accordance with and at the time specified in such notice."

Regulations
and fees.

Sect. 5. "All regulations as to the position and making of the grave which would be in force in such churchyard or graveyard in the case of persons interred therein with the service of the Church of England shall be in force as to burials under this Act; and any person who, if the burial had taken place with the service of the Church of England, would have been entitled by law to receive any fee, shall be entitled, in case of a burial under this Act, to receive the like fee in respect thereof."

Burial may
be with or
without
religious
service.

Sect. 6. "At any burial under this act all persons shall have free access to the churchyard or graveyard in which the same shall take place. The burial may take place, at the option of the person so having the charge of or being responsible for the same as aforesaid, either without any religious service, or with such Christian and orderly religious service at the grave, as such person shall think fit; and any person or persons who shall be thereunto invited, or be authorized by the person having the charge of or being responsible for such burial, may conduct such service or take part in any religious act thereat. The words

‘Christian service’ in this section shall include every religious service used by any church, denomination, or person professing to be Christian.”

Sect. 7. “All burials under this act, whether with or without a religious service, shall be conducted in a decent and orderly manner; and every person guilty of any riotous, violent, or indecent behaviour at any burial under this act, or wilfully obstructing such burial or any such service as aforesaid thereat, or who shall, in any such churchyard or graveyard as aforesaid, deliver any address, not being part of or incidental to a religious service permitted by this act, and not otherwise permitted by any lawful authority, or who shall, under colour of any religious service or otherwise, in any such churchyard or graveyard, wilfully endeavour to bring into contempt or obloquy the Christian religion, or the belief or worship of any church or denomination of Christians, or the members or any minister of any such church or denomination, or any other person, shall be guilty of a misdemeanor.”

Burials to be conducted in a decent and orderly manner, and without obstruction.

Sect. 8. “All powers and authorities now existing by law for the preservation of order, and for the prevention and punishment of disorderly behaviour in any churchyard or graveyard, may be exercised in any case of burial under this act in the same manner and by the same persons as if the same had been a burial according to the rites of the Church of England.”

Powers for prevention of disorder.

Sect. 9. “Nothing in this act shall authorise the burial of any person in any place where such person would have had no right of interment if this act had not passed, or without performance of any express condition on which, by the terms of any trust deed, any right of interment in any burial ground vested in trustees under such trust deed, not being the churchyard or graveyard, or part of the churchyard or graveyard, of the parish or ecclesiastical district in which the same is situate, may have been granted.”

Act not to give right of burial where no previous right existed.

Sect. 10. “When any burial has taken place under this act the person so having the charge of or being responsible for such burial as aforesaid shall, on the day thereof, or the next day thereafter, transmit a certificate of such burial, in the form or to the effect of Schedule (B.) annexed to this act, to the rector, vicar, incumbent, or other officiating minister in charge of the parish or district in which the churchyard or graveyard is situate or to which it belongs, or in the case of any burial ground or cemetery vested in any burial board to the person required by law to keep the register of burials in such burial ground or cemetery, who shall thereupon enter such burial in the register of burials of such parish or district, or of such burial ground or cemetery, and such entry shall form part thereof. Such entry, instead of stating by whom the ceremony of burial was performed, shall state by whom the same has been certified under this act. Any person who shall wilfully make any false statement in such certificate, and any rector,

Burials under act to be registered.

vicar, or minister, or other such person as aforesaid, receiving such certificate, who shall refuse or neglect duly to enter such burial in such register as aforesaid, shall be guilty of a misdemeanor."

Order of coroner or certificate of registrar to be delivered to relative, &c., instead of to person who buries.

Sect. 11. "Every order of a coroner or certificate of a registrar given under the provisions of section seventeen of the Births and Deaths Registration Act, 1874, shall, in the case of a burial under that act, be delivered to the relative, friend, or legal representative of the deceased, having the charge of or being responsible for the burial, instead of being delivered to the person who buries or performs any funeral or religious service for the burial of the body of the deceased; and any person to whom such order or certificate shall have been given by the coroner or registrar who fails so to deliver or cause to be delivered the same shall be liable to a penalty not exceeding forty shillings, and any such relative, friend, or legal representative so having charge of or being responsible for the burial of the body of any person buried under this act as aforesaid, as to which no order or certificate under the same section of the said act shall have been delivered to him, shall, within seven days after the burial, give notice thereof in writing to the registrar, and if he fail so to do shall be liable to a penalty not exceeding ten pounds."

Liberty to use burial service of Church of England in unconsecrated ground.

Sect. 12. "No minister in holy orders of the Church of England shall be subject to any censure or penalty for officiating with the service prescribed by law for the burial of the dead according to the rites of the said church in any unconsecrated burial ground or cemetery or part of a burial ground or cemetery, or in any building thereon, in any case in which he might have lawfully used the same service, if such burial ground or cemetery or part of a burial ground or cemetery had been consecrated. The relative, friend, or legal representative having charge of or being responsible for the burial of any deceased person who had a right of interment in any such unconsecrated ground vested in any burial board, or provided under any act relating to the burial of the dead, shall be entitled, if he think fit, to have such burial performed therein according to the rites of the Church of England by any minister of the said church who may be willing to perform the same."

Relief of clergy of Church of England from penalties in certain cases.

Sect. 13. "It shall be lawful for any minister in holy orders of the Church of England authorized to perform the burial service, in any case where the office for the burial of the dead according to the rites of the Church of England may not be used, and in any other case at the request of the relative, friend, or legal representative having the charge of or being responsible for the burial of the deceased, to use at the burial such service, consisting of prayers taken from the Book of Common Prayer and portions of Holy Scripture, as may be prescribed or approved of by the Ordinary, without being subject to any ecclesiastical or other censure or penalty."

Sect. 14. "Save as in this act expressly provided as to ministers of the Church of England, nothing herein contained shall authorize or enable any such minister who shall not have become a declared member of any other church or denomination, or have executed a deed or relinquishment under the Clerical Disabilities Act, 1870, to do any act which he would not by law have been authorized or enabled to do if this act had not passed, or to exempt him from any censure or penalty in respect thereof."

Saving as to ministers of Church of England.

SCHEDULE (A).

Notice of Burial.

I , of , being the relative [or friend, or legal representative, as the case may be, describing the relation if a relative], having the charge of or being responsible for the burial of A.B., of , who died at , in the parish of , on the day of , do hereby give you notice that it is intended by me that the body of the said A.B. shall be buried within the [here describe the churchyard or graveyard in which the body is to be buried], on the day of , at the hour of , without the performance in the manner prescribed by law of the service for the burial of the dead according to the rites of the Church of England, and I give this notice pursuant to the Burial Laws Amendment Act, 1880.

To the Rector [or, as the case may be], of ."

SCHEDULE (B).

"*I* , of , the person having the charge of (or being responsible for) the burial of the deceased, do hereby certify that on the day of , A.B. of , aged , was buried in the churchyard [or graveyard] of the parish [or district] of .

To the Rector [or, as the case may be], of ."

CHAPTER XI.

LITURGY AND RITUAL.

SECT. 1.—*General Law of the Church as to Ritual.*

- 2.—*Sources of the Law of the English Church as to Ritual.*
- 3.—*Ornaments and Vestments of Bishops and Ministers.*
- 4.—*Ornaments and Decorations of the Church.*
- 5.—*Attendance on and Behaviour at Public Worship.*
- 6.—*Acts of Uniformity.*
- 7.—*Performance of Divine Service.*
- 8.—*Kalendar and Tables of Lessons.*
- 9.—*Public Preaching.*
- 10.—*Publication of Notices in Church.*

SECT. 1.—*General Law of the Church as to Ritual.*

Necessity of
ritual.

EVERY church must have some ritual, that is, some recognized order established by competent authority, in accordance with which its rites and ceremonies are conducted.

Before we consider the question, what ceremonies are enjoined or allowed or forbidden by the ecclesiastical law of England, and more especially by that part of it which consists of the provisions of the Prayer Book and the Statutes of Uniformity, it is right to draw attention to the judgment of the church universal, and especially of "that pure and apostolical branch of it established in this realm," upon the general subject of ceremonies.

Distinction
between
mutable and
immutable
ceremonies.

And from that judgment it will appear that an essential distinction is drawn between those ceremonies which are from their origin immutable, and those which it is competent to the proper authorities to mould according to the varying necessities and exigencies of each particular church.

St. Paul.

The only orders given in the new Testament with respect to the ritual of the church are of the most general kind, and are to be found in the following passages: Saint Paul in his first epistle to the Corinthians directs,

"Let all things be done unto edifying,"

and

"Let all things be done decently and in order."

St. Augustine.

Saint Augustine, whose authority our church so highly regards, observes (a), "In his enim rebus de quibus nihil certi statuit

(a) Augustini, Opera, Epist. 36, vol. ii. p. 101.

“Scriptura Divina, mos populi Dei, vel instituta majorum pro lege tenenda sunt.”

And St. Jerome, to whom our articles refer, says (*b*), “Sed ego illud breviter te admonendum puto traditiones ecclesiasticas, [præsertim] (remark the caution) “quæ fidei non officiant] ita observandas ut a majoribus traditæ sunt: nec aliorum consuetudinem, aliorum contrario more subverti. . . . Sed unaquæque provincia abundet in sensu suo, et præcepta majorum leges apostolicas arbitretur.”

When Augustine, the missionary of Gregory the Great (to whom this country is so much indebted), found the ancient British Churches in possession of a ritual in accordance with the Gallican use and that of the Eastern Church, he became perplexed what course to pursue, and wrote for advice on the subject to the pope. From our old historian Bede we learn how wise an answer he received (*c*):

“Cum una sit fides,” wrote Augustine, “sunt ecclesiarum diversæ consuetudines, et altera consuetudo missarum in sanctâ Romana ecclesia, atque altera in Galliarum tenetur? Respondit Gregorius Papa. Novit fraternitas tua Romanæ ecclesiæ consuetudinem, in qua se meminit nutritam. Sed mihi placet, sive in Romanâ, sive in Galliarum, seu in qualibet ecclesiâ aliquid invenisti quod plus Omnipotenti Deo possit placere, sollicite eligas, et in Anglorum ecclesia, quæ adhuc ad fidem nova est, institutione præcipua, quæ de multis ecclesiis colligere potuisti, infundas. Non enim pro locis res, sed pro bonis rebus loca amanda sunt. Ex singulis ergo quibusque ecclesiis, quæ pia, quæ religiosa, quæ recta sunt elige; et hæc, quasi in fasciculum collecta, apud Anglorum mentes in consuetudinem depone.”

According to a later historian of our church, the learned Field, Dean of Gloucester:

“Ceremonies are outward acts of religion, having institution, either from the instinct of nature, as the lifting up of the hands and eyes to heaven, the bowing of the knee, the striking of the breast, and such like; or immediately from God, as the Sacraments; or from the Church’s prescription: and either only serve to express such spiritual and heavenly affections, dispositions, motions, and desires as are or should be in men; or else to signify, assure, and convey unto them such benefits of saving grace as God in Christ is pleased to bestow on them. To the former purpose and end the church hath power to ordain ceremonies; to the later, God only” (*d*).

And Burnet in his History of the Reformation (*e*), expressing himself with greater accuracy than usual, in speaking of the

(*b*) Hieronymi, Opera, vol. i. p. 432; Ep. 71, ad Lucinium Bæticum.

(*c*) Bede, Hist. lib. i. cap. 27, § 60, Secunda interrogatio Augus-

tini, ed. Stevenson, vol. i. p. 59.

(*d*) Field, Of the Church, vol. ii. p. 527.

(*e*) Part ii. Book i. ed. Pocock, vol. ii. p. 155.

St. Jerome.

Archbishop Augustine.

Dean Field.

Bishop Burnet.

use of a ceremony in relation to the belief of the church, says, "This seems more necessary to be well explained, by reason of the scruples that many have since raised against significant ceremonies, as if it were too great a presumption in any church to appoint such, since these seem to be of the nature of sacraments. Ceremonies that signify the conveyance of a divine grace and virtue are indeed sacraments, and ought not to be used without an express institution in Scripture; but ceremonies that only signify the sense we have, which is sometimes expressed as significantly in dumb shows as in words, are of another kind: and it is as much within the power of the church to appoint such to be used, as it is to order collects and prayers; words and signs being but different ways of expressing our thoughts."

The Thirty-nine Articles.

The language of our church in her articles on this subject is expressed as follows: In Article 20—

"Of the Authority of the Church.

"The Church hath power to decree Rites and Ceremonies, and authority in controversies of faith: And yet it is not lawful for the Church to ordain anything that is contrary to God's Word written, neither may it so expound one place of Scripture, that it be repugnant to another. Wherefore, although the Church be a witness and a keeper of holy Writ, yet, as it ought not to decree anything against the same, so besides the same ought it not to enforce anything to be believed for necessity of salvation."

And in the 34th Article,—

"Of the Traditions of the Church.

"It is not necessary that Traditions and Ceremonies be in all places one, or utterly like, for at all times they have been divers, and may be changed according to the diversities of countries, times, and men's manners, so that nothing be ordained against God's Word. Whosoever through his private judgment, willingly and purposely, doth openly break the traditions and ceremonies of the church, which be not repugnant to the word of God, and be ordained and approved by common authority, ought to be rebuked openly (that others may fear to do the like), as he that offendeth against the common order of the Church, and hurteth the authority of the Magistrate, and woundeth the consciences of the weak brethren.

"Every particular or national Church hath authority to ordain, change, and abolish ceremonies or rites of the Church ordained only by man's authority, so that all things be done to edifying."

Bishop the authority as to ritual.

I should observe that the general canon law unquestionably placed in the hands of the bishop the authority to govern all questions of ritual.

"Et quidem," Van Espen says "quia dispares diversarum Nationum mores et ingenia diversos ritus et cæremonias, ut in

“politicis ita in ecclesiasticis exigunt, hinc in ritibus magna
 “Ecclesiarum varietas; præsertim quia nullo extante de his
 “Christi vel Apostolorum præcepto, libera potestas Episcopis
 “relicta erat, id sentiendi et decernendi quod unicuique salvâ
 “fide magis expediens videbatur.”

And citing the decree of a synod he says: “Novæ cære-
 “monie nullæ in Ecclesiis recipiantur sine Episcopi judicio” (*f*).

Such being the general law of the Western Church as to
 matters of ritual, we have now to consider the law of the Church
 of England on this subject.

Law of the
 Church of
 England.

No argument of the continuity of the Church of England,
 from the period of its first foundation in this country to the
 present time, can be stronger than that which is derived from
 the structure, order, and contents of the Prayer Book. It con-
 tains the Breviarium, in which towards the end of the 11th
 century had been inserted all the offices of the canonical hours,
 called also Portiforium and in England Portuary, the Missale
 or the service for the holy communion, and the Ordinale, which
 is referred to under the name of the “Pie” in the preface. There
 were various “Uses” or Prayer Books in England, known as
 the Salisbury, the York, the Bangor, and the Hereford Uses,
 and others. The most celebrated appear to have been the
Portiforium or Breviary of Sarum, which contained the daily
 services,—the Sarum Missal, which contained the holy com-
 munion service,—and the Sarum Manual, a book of occasional
 offices. These books of devotion seem to have been compiled by
 Osmund, Bishop of Salisbury, about the time of the Conquest;
 and in 1531 a reformed edition of the Sarum Portiforium was
 reprinted, and shortly afterwards a reformed missal was pub-
 lished. There were also Primers, which contained, in a vulgar
 tongue, large portions of the service in use amongst the people.
 In 1536 the Roman Breviary was reformed, and published by a
 Spanish Bishop, Cardinal Quignonez; and in 1544 Hermann,
 Archbishop of Cologne, whom the Pope during the early
 sittings of the Council of Trent deprived (*g*), published a re-
 formed ritual (*h*).

Structure of
 Prayer Book.

In 1542 Henry VIII. directed Convocation to consider the
 revision of the books of devotion then in use in this country.
 It is probable that the fruit of their labours, as well as the
 other works to which reference has been made, were laid before
 the royal visitors appointed by Edward VI. in January 1546—47,
 and the Committee of Convocation, to whom the preparation of
 the Prayer Book of 1549 was intrusted.

The whole Prayer Book in fact, with very inconsiderable

(*f*) Van Espen, *Jus Ecclesiasticum Universum*, pars. 2, sect. 1, tit. 5, cap. 1, ss. 15, 24, vol. i. pp. 411, 412. And see, as to the general practice for each province to follow the ritual of the metro-

politan church, Gibs. 259.

(*g*) Sarpi, *Istoria del Concilio Tridentino*, lib. ii. § 59.

(*h*) See preface to the Annotated Book of Common Prayer by Blunt.

exceptions, consists of a translation of the ancient liturgies, and especially of the liturgy used by the Western Church. And we learn from the preface to the Prayer Book that the object was to restore that "godly and decent order of the ancient fathers" which had been broken, and to introduce an order of prayer and reading of Holy Scripture "agreeable to their mind and purpose;" and that all suggested alterations which "secretly struck at some laudable practice of the whole Catholic Church of Christ" were rejected; and that the calendar contained a "table of feasts, vigils, fasts, and days of abstinence," which were in accordance with primitive and catholic use; while the ornaments of the church and the vestments of the ministers were such as to present to the people some of the most prominent features of the ancient service, and were for this reason the ground of unceasing attack from the Puritans, and the disciples of the Genevan school. And it is the observation of Mr. Hallam, while speaking of the Roman Catholics, that it was "always held out by our Church, when the object was conciliation, that the liturgy was essentially the same with the mass-book" (*i*).

Distinction
between Rites
and Cere-
monies.

In the case of *Martin v. Mackonochie* (first suit) (*k*) the question was much discussed in the Court of Arches whether the terms Rite and Ceremony were identical in their legal import and signification.

In his judgment in that case, Sir Robert Phillimore referred to and quoted the Preface to the present Prayer Book; the note on ceremonies at the close of the dissertation at the end of the services; the language of the Bishop of Winchester at the Hampton Court Conference in 1603 (*l*); Van Espen (*m*); the Roman Ritualists Gavanto and Quarti (*n*), and the Council of Trent (*o*).

On the whole the result of this examination of authorities led him to the conclusion that there was a legal distinction between a rite and a ceremony; the former consisting in services expressed in words, the latter in gestures or acts preceding, accompanying, or following, the utterance of these words, and including the use of lights, incense and vestments.



SECT. 2.—*Sources of the Law of the English Church as to Ritual.*

Legal sources
of ritual in
England.

The ritual of the Church of England, both as relates to the ornaments of the church and the dresses and posture of the

(*i*) Constitutional History, vol. i. p. 92.

(*k*) L. R., 2 Adm. & Eccl. p. 116.

(*l*) Cardwell, Conferences (3rd ed.), p. 197.

(*m*) Van Espen, Jus Ecclesiasti-

cum Universum, pt. 2, sect. 1, tit. 5, cap. 1, § 9.

(*n*) Gavanto, Thesaurus Sacrorum Rituum, pt. 1, tit. 1, vol. i. p. 3 (ed. 1823).

(*o*) Conc. Trid. Sess. xxii., cap. v.

minister, are derived from the following sources: custom and usage, canons of the church, and statutes of the realm. The proposition that in case of conflict the latter source was the one recognized by the law, used to be deemed a sound legal position. It has, however, apparently been somewhat impaired by the decision of the Privy Council in the case of *Hebbert v. Purchas* (*p*), and perhaps also by the decision of the same tribunal in *Ridsdale v. Clifton* (*q*), in which it would seem that the positive words of the statute or rubric of Charles the Second were controlled and limited in their plain meaning by the language of the canons of 1603.

With respect to the more stringent categories of rubrics, namely, those which relate to things lawful and ordered, and things unlawful and prohibited, there is a question *in limine* which must be considered. Is there a common law of the church unwritten, living by usage, though partly expressed, perhaps, by judicial decisions; but still more, to use a common expression, taken for granted by all authorities in church and state—filling up the void of positive provision in statute or formulary—a necessary part of an organized religious system and establishment, rendering the practical working of it possible, and, on the whole, harmonious?

Construction of rubrics generally.

In the case of *Martin v. Mackonochie* (*r*), Sir Robert Phillimore held as follows:—"That there has been such a usage in the church at large, from its earliest foundation, is certain. 'We know no such customs, neither we nor the churches of 'God,' was the language which we learn from inspired authority she used as her shield against the earliest assaults upon her integrity. 'Let the ancient customs prevail' was the maxim, fatal to the mediæval and modern pretensions of Rome, which the Church enunciated in her earliest œcumenical council. The canon law of the Western Church fully recognizes custom and usages as a distinct source of ecclesiastical jurisprudence. Was the branch of this church, which the constitution and the legislature have established in this kingdom, devoid of this subsidiary aid to her discipline and government?"

Usage as affecting construction.

Sir Robert Phillimore then quoted the case of *Willson v. McMath* (*s*), where a very curious question was raised, whether the minister, as such, has a right to preside at a vestry meeting, and in which Sir John Nicholl, the official principal of the Archbishop of Canterbury, observed: "The case is said to be a new one, so far as regards any express law, or any judicial decision on the subject. There is no statute, no canon, no reported judgment, either expressly affirming or expressly negating the right. It nevertheless may exist as a part of the common law of the land, as a part of the *lex non scripta*,

Common law of the Church.

(*p*) L. R., 3 P. C. p. 605.

(*q*) 2 P. D. p. 276.

(*r*) L. R., 2 Adm. & Eccl. 116, and Special Report. The passages

which follow were not affected by the decision of the Privy Council.

(*s*) 3 Phillim. p. 67.

which is of binding authority, as much in the ecclesiastical as in the temporal courts. Indeed, the whole canon law rests for its authority in this country upon received usage; it is not binding here *proprio vigore*. Moreover, this court upon many points is governed, in the absence of express statute or canon, by the *jus tacito et illiterato hominum consensu et moribus expressum*.

"It is true that generally the existence of this *jus non scriptum* is ascertained by reports of adjudged cases; but it may be proved by other means: it may be proved by public notoriety, or be deducible from principles, and analogy, or be shown by legislative recognitions. Published reports of the decisions of the ecclesiastical courts (with one very recent exception) do not exist; and if they did, yet the particular right in dispute may never have been so much as doubted or questioned before." Sir Robert Phillimore then proceeded thus: "Upon this principle, in the time of James I., the King's Bench refused to prohibit the ordinary from compelling a woman to be churched in a veil, because it was certified by divers bishops to be the common custom of the Church of England (*t*)."

"There is, therefore, a common law of the church which runs by the side of the statute law, and which must assist in the construction of it.

"It is often said that a rubric should be construed on the same principles as an act of parliament; but admitting this to be so, it is obvious that there are peculiar difficulties incident to the construction of a rubric which seldom, or in a much less degree, beset the construction of an ordinary statute. And it will appear from what has been already said, that the right understanding of the rules supplied by the rubric for the regulation of the services may often require a reference to the sources not only of historical, but to a certain extent theological knowledge.

"There is one important rule applicable to the construction of all instruments, namely, that the construer should endeavour to place himself in the position of the framer of the instrument, and to gather from all the circumstances which surrounded him at the time when he framed it, and from the context of other portions of the instrument, what the real meaning and intention was, if the language which he has used have left that meaning and intention doubtful or obscure."

He supported this view by the case of *Escott v. Mastin* (*u*), already referred to, in which a question as to the lawfulness of baptism, administered by a layman with water and the invocation of the Trinity, was mooted, and the Privy Council observed as follows:—

"The 68th canon being that upon which this proceeding is

(*t*) *Shipden v. Redman*, Palm. p. 296; vide *supra*, p. 645.

(*u*) 4 Moo. P. C. C. p. 104; vide *supra*, p. 494.

grounded, it is necessary to consider what the law was at the date of the canon, the year 1603. Without distinctly ascertaining this, we cannot satisfactorily determine what change the rubric of 1661, adopted into the 14 Charles 2, c. 4, made, and in what state it left the law on this head; because it is very possible that the same enactment of a statute, or the same direction in a rubric, bearing one meaning, may receive one construction when it deals for the first time with a given subject-matter, and have another meaning and construction when it deals with a matter that has already been made the subject of enactment or direction; and this is most specially the case where the posterior enactment or direction deals with the matter without making any reference to the prior enactment or direction. Still more is it necessary to note the original state of the law, when it is the common law that comes in question, as well as the statute.

“The words are plainly directory, and do not amount to an imperative alteration of the rule then subsisting. If lay baptism was valid before the new rubric of 1661, there is nothing in that rubric to invalidate it. Generally speaking, where anything is established by statutory provisions, the enactment of a new provision must clearly indicate an intention to abrogate the old, else both will be understood to stand together if they may. But, more especially, where the common law is to be changed—and, most especially, the common law which a statutory provision had recognized and enforced—the intention of any new enactment to abrogate it must be plain to exclude a construction by which both may stand together. This principle, which is plainly founded in reason and common sense, has been largely sanctioned by authority.”

He continued, “Let me apply this rule to the subject before me. The first Prayer Book of Edward VI. contains only one prohibition, the elevation of the blessed sacrament; but it contains various directions respecting the articles to be used in the administration of the holy communion. It has been pointed out that the enumeration of these articles could not be exhaustive, inasmuch as the indispensable article of ‘a fair linen cloth’ is omitted from it.

Omission not necessarily prohibition.

Fair linen cloth.

“The argument is, I think, valid; the officiating priest must have supplied this article, and the legislature must have intended him to supply it.

“He must have looked to an unwritten use, the foundation of a common law for the church, not less than for the state.

“Just as much as it must have intended by the rubric in our present Prayer Book: ‘The priest shall then place upon the ‘table so much bread and wine as he shall think sufficient,’ that there should be a table or place from which the elements should be then brought; and therefore the Judicial Committee of the Privy Council, reversing the sentence of the Consistory of London and the Court of Arches, decided that the credence

Credence Table.

table, which supplied this want, was a lawful ornament. Those who compiled the first Prayer Book of Edward VI. were not inventing a ritual for the first time, but were constructing one from the various service books, some English and some foreign, which they had before them. This ritual was to be placed in the hands of persons conversant with the older service books; and it seems highly unreasonable to suppose that it was not competent to the priest to supply any accidental omission in the new ritual by a reference to the previously existing usage and practice. In the same way, in the Sarum Missal no mention is to be found of the two lights to be placed upon the altar, but there is no doubt that the constitution which ordered these two lights was legally binding upon, and must have been a part of the furniture of, those churches which adopted the use of Sarum, at least in the province of Canterbury. Another illustration is furnished by the very remarkable fact that the second Prayer Book of Edward VI. omitted all reference to the manual acts, ordered in the first and last Prayer Book, attending the consecration of the holy elements; and that during the whole period which elapsed between the date of the second Prayer Book in 1552 and that of the present Prayer Book in 1661, the officiating priest was left without any direction upon this subject in the Prayer Book which he was to use. Now, one of two consequences must follow: either the cup was never taken in the hand, the bread never broken, as at present, or these manual acts were done without any specific order in the Prayer Book, as a matter of recognized usage and custom. No proof has been laid before me, and I can find none, as to the omission of these necessary acts during a period of more than a century, and I think the inference that they must have been still practised is reasonable and sound.

Manual acts.

"And in this opinion I am strengthened by observing that at the Savoy Conference the dissenters, objected, 'that the manner 'of the consecrating of the elements is not here' (*i. e.*, in the consecration prayer) 'explicite and distinct enough, and the 'minister's breaking of the bread is not so much as mentioned.' The bishops replied by conceding 'that the manner of consecrating 'the elements be made more explicit and express,' which was the origin of our present rubric (*x*).

Bishop Cosin.

"The opinion of Bishop Cosin (*y*), a high authority upon this subject, appears to me sound. 'And it is to be noted that the book does not everywhere enjoin and prescribe every little order that should be said or done, but takes it for granted that people are acquainted with such common, and things already used as such. Let the Puritans, then here, give over their endless cavils, and let ancient custom prevail, the thing which our church chiefly intended in the review of this service.'

(*x*) Cardwell, *Conferences* (3rd ed.), pp. 321, 363. (*y*) *Works*, vol. v. p. 65.

"This reasoning, therefore, brings me to the conclusion, that from the mere silence of the rubric a positive prohibition cannot in all cases be inferred. Something more is required to render the article supplied illegal. For instance, the mention of the article in a former Prayer Book, and the omission of it in the present, may furnish a presumption that it was intentionally rejected, even when it be in itself innocent, or apparently expedient. Or the article must have, as has been already observed, some necessary connection with a use inconsistent with the principles upon which the formularies of the church are founded.

"I must repeat that the rubrics with respect to decorations and furniture of the church are not exhaustive. This point has been decided by the Judicial Committee of the Privy Council. They allowed on this principle the use of the cross and the credence table and the various coloured cloths for the holy table. They allowed also the use of a moveable ledge for the purpose of holding candlesticks upon the holy table. . . ." (z).

Rubrics not exhaustive.

SECT. 3.—*Ornaments and Vestments of Bishops and Ministers.*

Those of bishops have been already mentioned in the Chapter on Bishops (a).

There seems no doubt that a surplice is the authorized ornament or vestment of the minister at matins, evensong, baptizing and burying as provided by the rubric at the end of the first Prayer Book of Edward VI. which will be quoted immediately, and that (as Dr. Burn observed (b)) there is no vestment prescribed for marrying or for churching of women.

Surplice.

The controversy as to the proper Eucharistic vestments of priests and deacons was first submitted to direct judicial decision in the case of Mr. Purchas. The following passages taken from the judgment of Sir Robert Phillimore in that case (c) state fully the various positions which had been taken.

Eucharistic vestments.

"The rubric (for I shall use this expression for the sake of clearness), which it is admitted contains the law as to the vestments of the bishop, priest and deacon, is as follows:—

Rubric.

"And here it is to be noted that such ornaments of the church, and of the ministers thereof at all times of their ministration, shall be retained and be in use as were in this Church of England by authority of parliament, in the second year of the reign of King Edward the Sixth." * * * *

(z) *Liddell v. Beal*, 14 Moo., P. O. C. p. 1.

(a) *Vide supra*, Part II., Chap. I., pp. 48, 49, and notes thereto.

(b) *Ecclesiastical Law*, vol. iii. p. 437.

(c) *Elphinstone v. Purchas*, L. R., 3 Adm. & Eccl. p. 66.

Prayer
Book of
2 Edw. VI.

“The rubrics in regard of vestments in the first Prayer Book of Edward VI., to which I am referred by the present rubric, were as follows:—

“(1.) At the beginning of the Communion Service—

“‘The priest that shall execute the holy ministry shall put upon him the vesture appointed for that ministration, that is to say, a white albe, plain, with a vestment or cope. And where there be many priests or deacons, there so many shall be ready to help the priest in the ministration as shall be requisite, and shall have upon them likewise the vestures appointed for their ministry, that is to say, albes, with tunicles.’

“(2.) At the end of the Communion Service—

“‘And though there be none to communicate with the priest, yet these days (after the liturgy ended) the priest shall put upon him a plain albe or surplice, with a cope, and say all things at the altar (appointed to be said at the celebration of the Lord’s Supper) until after the offertory.’

“(3.) At the end of the Book of Common Prayer, after the exposition ‘of ceremonies’:—

“‘In the saying or singing of matins and evensong, baptizing, and burying, the minister in parish churches or chapels annexed to the same, shall use a surplice; and in all cathedral churches and colleges, the archdeacons, deans, provosts, masters, prebendaries, and fellows, being graduates, may use in the choir, besides their surplices, such hoods as pertaineth to their several degrees which they have taken in any university within this realm; but in all other places every minister shall be at liberty to use any surplice or no. It is also seemly that graduates when they do preach should use such hoods as pertaineth to their several degrees. And whensoever the bishop shall celebrate the holy communion in the church, or execute any other public ministration, he shall have upon him, beside his rochet, a surplice or albe, and a cope or vestment; and also his pastoral staff in his hand, or else borne or holden by his chaplain.’

Prayer Book
of 5 & 6
Edw. VI.

“These rubrics were abolished by the second Prayer Book of Edward VI., which substituted the following:—

“‘The minister at the time of the communion, and at all other times in his ministration, shall use neither alb, vestment, nor cope; but being archbishop or bishop he shall have and wear a rochet, and being a priest or deacon shall have and wear a surplice only.’

“All these rubrics, and the services to which they belong, were repealed in the reign of Queen Mary (*d*).

Elizabethan
Act of
Uniformity.

“By the next Act of Uniformity (*e*) it was enacted—

“‘That such ornaments of the church, and of the ministers thereof, shall be retained and be in use as was in this Church of England by authority of parliament in the second year of King Edward VI., until other order shall be taken by the authority

of the Queen's Majesty, with the advice of her commissioners appointed and authorized under the great seal of England for causes ecclesiastical, or of the Metropolitan of this realm.

"Annexed to this statute by sect. 2, was the Queen's Prayer Book, the rubric to which was as follows:—

"And here it is to be noted that the minister, at the time of the communion, and at all other times in his ministration, shall use such ornaments in the church as were in use by authority of parliament in the second year of the reign of King Edward VI., according to the Act of Parliament set in the beginning of this book."

"It will be observed that the words 'retained and' which do occur in the act, were omitted in this rubric; and they do not appear in the rubric of the Prayer Book of King James, which is identical with that of Elizabeth.

"It is admitted that on the passing of this statute the vestments prescribed by the first Prayer Book came into legal use; but it has been contended that Queen Elizabeth exercised the power given her by the statute, and 'took other order.' As to any "other order."

"If any such further order were taken in compliance with the statute, it must be in one of four ways:—

"(1.) Either by the Injunctions of 1559, or (2) the Advertisements of 1564-5, or (3) the Canons of 1603-4, or (4) the Canons of 1640. Of these four the Advertisements were principally relied upon as the execution of the further order, though the Canons of 1603-4 were also prayed in aid. Before, however, I consider these two modes of execution, I will say a word as to the Injunctions and the Canons of 1640. The Injunctions, which I think must upon the whole be considered as having been issued by the royal authority alone, and as not having statutory authority, do not contain any express order with regard to the vestments; but the archbishop and certain bishops afterwards drew up 'Interpretations and further Considerations of these Injunctions for the better direction of the clergy;' among which is to be found the following:—

"Concerning the Book of Service."

"First. That there be used only but one apparel; as the cope in the ministration of the Lord's Supper, and the surplice in all other ministrations' (f).

"With respect to the Canons of 1640, they contain no provision as to the subject of vestments. I come therefore to a consideration of the Advertisements. Those which refer to the present question are as follows:—

"Item. In ministration of the holy communion in the cathedral and collegiate churches, the principal minister shall use a cope, with gospeller and epistoler agreeably; and at all others prayers to be sayde at the communion table, to use no copes but surplices."

The Advertisements of 1564-5. ✓

P. 720.

“‘Item. That the deane and prebendaries weare a surplesse with a silke hooode in the quyer; and when they preache in the cathedrall or collegiate church to weare their hooode.’

“‘Item. That every minister sayinge any publike prayers, or ministringe of the sacramentes, or other rites of the church, shall weare a comely surples, with sleeves, to bee provided at the charges of the parishe’ (g).

“ The queen, it is probable from conflicting motives, partly from the influence of Leicester, and partly from an apprehension of weakening the rubric which referred to the second year of Edward VI., refused her official sanction to these Advertisements, and as I think Dr. Cardwell correctly states,—

“‘Left them to be enforced by the several bishops on the canonical obedience imposed upon the clergy, and the powers conveyed to the ordinaries by the Act of Uniformity. Their title and preface certainly do not claim for them the highest degree of authority; and although Strype infers from certain evidence which he mentions that they afterwards received the royal sanction, and recovered their original title of Articles and Ordinances, it seems more probable that they owed their force to the indefinite nature of episcopal jurisdiction, supported, as in this instance was known to be the case, by the personal approval of the sovereign’ (h).

“I think the fair result of the history derived from printed books on the subject is, that the queen never gave her official or legal sanction to these ‘Advertisements,’ but allowed them to be issued by the prelates with the assurance that they had her personal sanction; and I may add that, to the best of my belief, no legal treatise of authority, and no judgment of a court of justice has ever yet pronounced that these ‘Advertisements’ were issued under the conditions which the statute of Elizabeth required. . . .”

Construction
of the Ad-
vertisements.

Sir Robert Phillimore also thought that the Advertisements, even if issued under such conditions, did not affect the construction of the present rubrics or alter the law as to the Eucharistic vestments, because “there are no prohibitory words, such as were contained in the rubric to the second Prayer Book of Edward VI., with regard to the ornaments of ministers,—and this omission is worthy of notice,—for the gloss which all ecclesiastical history, contemporaneous and subsequent, would give to the Advertisements is that they provided that the ornaments of the minister should not fall below a certain point; not that it should not exceed that point. The object of the Advertisements was to give notice that the minimum of ornament mentioned in them would be enforced by authority, just as, with regard to the vestment of the holy table, the 82nd Canon prescribed that it should be ‘covered with a carpet of silk or other decent stuff,’ and Dr. Lushington held that this excluded other vestments

of the altar,—but their lordships observed in *Liddell v. Weston* :—

“‘Next as to the embroidered cloths, it is said that the canon orders a covering of silk, or of some other proper material, but that it does not mention, and, therefore, by implication excludes more than one covering. Their lordships are unable to adopt this construction. An order that a table shall always be covered with a cloth surely does not imply that it shall always be covered with the same cloth, or with a cloth of the same colour or texture. The object of the canon seems to be to secure a cloth of a sufficiently handsome description, not to guard against too much splendour’ (i).”

He dealt then with the argument from the Canons of 1603 :

“It was more faintly argued that, even if the Advertisements did not execute the power given by statute, the Canons of 1603-4 had this effect. Upon this argument it is to be observed, in the first place, that they contain no prohibitory words ; and it is upon this very ground that one of them, as I have already said, which gave directions as to the covering of the holy table, was held by the Privy Council not to be exhaustive, or to exclude the use of other coverings. In the second place, it is, to say the very least, questionable whether the words ‘by the authority of the queen’s majesty,’ with the approval of the particular persons mentioned therein, could confer any power upon the succeeding monarch. And, thirdly, the Canons of 1603-4 were made in convocation with the consent of the crown and under the statute of Henry VIII. (25 Hen. 8, c. 19), and were the creatures of the distinct ecclesiastical legislature known to the constitution of this country ; and it seems to me impossible to hold, because the crown ratified what the convocation did, that a canon so enacted by convocation under the statute of Henry VIII., could be an execution of a power under a totally different statute : and it is moreover fatal to the argument, that the metropolitan was not a member of this convocation, as appears by the recital in the crown’s writ prefixed to the canons, the Bishop of London presiding during the vacancy of the see. Lastly, and this remark applies equally to the Advertisements, unless the words ‘be retained,’ are to have a special construction put upon them,—a subject which I will presently consider,—a subsequent statute, which expressly revived a prior statute inconsistent with the Advertisements of Queen Elizabeth, would, by necessary implication, repeal them.

Canons of
1603.

“I have already observed that the words ‘be retained’ are in the statute, though not in the Prayer Book of Elizabeth. Now is there any reason for supposing that this variance was intentional or significant ? or was the variance accidental and insignificant, because the words were treated as an amplification of the words ‘be in use’ ? I think the last is the true solution,

Construction
of the words
“beretained.”

and certainly the Privy Council in *Liddell v. Westerton* were of this opinion; they had to construe the words 'be retained' as well as the words be 'in use;' they drew no distinction between the two expressions; they did not rule that the ornaments of the church could not be legal unless they satisfied the double condition, of being in use at the time when the rubric of Charles II. became law, and also of their being prescribed by the Prayer Book of Edward VI. On the contrary, referring to the difference of language between the statute and the rubric of Elizabeth, they said—

"It will be observed that this rubric does not adopt precisely the language of the statute, but expresses the same thing in other words. The statute says, "such ornaments of the church and of the ministers thereof shall be retained and be in use," the rubric, "that the minister shall use such ornaments in the church" (j).

"In truth, there would be an insuperable difficulty in satisfying the supposed condition that the ornaments must have been *de facto* in use; for what ornaments were in use at the time of the Restoration? The churches had been for many years in the possession of the Presbyterians—where they had not been driven out by the Independents; neither catholic doctrine nor ritual could be found in the churches until after St. Bartholmew's day.

"Nor is the difficulty lessened if the condition be interpreted to imply that the ornaments must be *de jure* in use; that would take us back, passing over the Protectorate of Cromwell, to the last year of Charles I.'s reign, that is, if my observations as to the Advertisements and Canons are correct, to the Elizabethan Act of Uniformity, and would give a meaning to the words 'be retained' in Charles II.'s rubric, which it is admitted they had not in Elizabeth's Act of Uniformity" (k).

*Liddell v.
Westerton.*

The case of *Westerton v. Liddell*, which came on appeal to the Privy Council as *Liddell v. Westerton*, did not directly bear on the ornaments or vestments of the minister, but on the ornaments of the church. But as both are governed by the same rubric, the several courts, and in particular the Privy Council, did consider both, and in their judgment, in the last-mentioned case, besides the passage just quoted, will be found the following:—

"Their lordships, after much consideration, are satisfied that the construction of this rubric which they suggested at the hearing of the case is its true meaning, and that the word "ornaments" applies, and in this rubric is confined to those articles the use of which in the services and ministrations of the church is prescribed by the Prayer Book of Edward the Sixth.

"The term "ornaments" in ecclesiastical law is not confined, as by modern usage, to articles of decoration or embellishment, but it is used in the larger sense of the word "ornamentum,"

(j) Moore, Special Report, p. 159.

(k) *Elphinstone v. Purchas*, L. R., 3 Adm. & Eccl. p. 66, 78, 91—93.

which, according to the interpretation of Forcellini's Dictionary, is used "pro quocumque apparatu, seu instrumento." All the several articles used in the performance of the services and rites of the church are "ornaments;" vestments, books, cloths, chalices, and patens, are amongst church ornaments; a long list of them will be found extracted from Lyndwood, in Dr. Phillimore's edition of Burn's Ecclesiastical Law. . . . In modern times organs and bells are held to fall under this denomination.

"When reference is had to the First Prayer Book of Edward the Sixth, with this explanation of the term "ornaments," no difficulty will be found in discovering amongst the articles of which the use is there enjoined, ornaments of the church, as well as ornaments of the ministers. Besides the vestments differing in the different services, the rubric provides for the use of an English Bible, the new prayer Book, a poor man's box, a chalice, a corporas, a paten, a bell, and some other things. . . . (l)

"The rubric to the Prayer Book of January 1st, 1604, adopts the language of the rubric of Elizabeth. The rubric to the present Prayer Book adopts the language of the statute of Elizabeth; but they all obviously mean the same thing, that the same dresses and the same utensils or articles which were used under the first Prayer Book of Edward VI. may still be used" (m).

These conclusions appear to have been approved by the Privy Council in the subsequent case of *Martin v. Mackonochie* (n).

*Martin v.
Mackonochie.*

In October, 1864, a commission under the Clergy Discipline Act was issued by Dr. Phillpotts, then Bishop of Exeter, to inquire into certain charges against the curate of Helston, the principal one being the use of the surplice in preaching. The bishop, in his judgment upon this point, after stating the several statutes and rubrics, says—

Bishop of
Exeter's
judgment in
*The Helston
Case.*

"From this statement it will be seen that the surplice may be objected to with some reason; but then it must be because the law requires 'a white albe plain, with a vestment or cope.' Why have these been disused? Because the parishioners—that is the churchwardens, who represent the parishioners—have neglected their duty to provide them; for such is the duty of the parishioners by the plain and express canon law of England. True it would be a very costly duty, and for that reason, most probably, churchwardens have neglected it, and archdeacons have connived at the neglect. I have no wish that it should be otherwise. But, be this as it may, if the churchwardens of Helston shall perform this duty, at the charge of the parish, providing an albe, a vestment, and a cope, as they might in strictness be required to do, I shall enjoin the minister, be he who he may, to use them. But until these ornaments are

(l) Moore, Special Report, at pp. 156, 157.

(m) Ibid. at p. 159.

(n) L. R., 2 P. C. p. 390.

provided by the parishioners, it is the duty of the minister to use the garment actually provided by them for him, which is the surplice" (o).

Conclusion of
judgment of
Archies Court,
in *Elphinstone*
v. *Purchas*.

Sir Robert Phillimore quoted these and other authorities in his judgment in the case of Mr. Purchas, and concluded by saying—

"I am of opinion that the plain words of the statute, according to the ordinary principles of interpretation, and the construction which they have received in the two judgments of the Privy Council, oblige me to pronounce that the ornaments of the minister mentioned in the First Prayer Book of Edward VI. are those to which the present rubric referred; and I cannot, therefore, pass any ecclesiastical sentence against Mr. Purchas for wearing them.

Ornaments of
the minister
prescribed by
rubric of
Edw. VI.

"The next question is, What are these ornaments?

"They are, for ministers below the order of bishops, and when officiating at the communion service, cope, vestment or chasuble, surplice, alb, and tunicle; in all other services the surplice only, except that in cathedral churches and colleges the academical hood may be also worn. The other vestments worn by Mr. Purchas, and the cope at any other time but the communion service, are unlawful, and may not be worn. It is unlawful, therefore, for Mr. Purchas to wear or authorize to be worn, a cope at morning or at evening prayer; albs with patches called apparels, tippets of a circular form, stoles of any kind whatsoever, whether black, white, or coloured, and worn in any manner; dalmatics and maniples, which latter ornament, it appears from the evidence, was worn on one occasion by one of the officiating clergymen, though it does not appear that Mr. Purchas wore one himself. As to the girdle and the amice it is not proved that Mr. Purchas wore them or suffered them to be worn.

As to the
biretta.

"With respect to the covering or cap called a 'biretta,' which Mr. Purchas was proved to have carried in his hand, and a clergyman to have worn in a procession, it appears to me as innocent an ornament as a hat or a wig, or as a velvet cap, which latter is not uncommonly worn by bishops, clergy, and laity as a protection to the head when needed. The 74th Canon, which is still in force, and which enjoins decency of apparel to ministers when out of their houses, provides that 'no ecclesiasticall persons shall weare any coife or wrought night-caps, but onely plaine night-caps of blacke silke, sattin, or velvet.' And the 18th Canon provides that 'no man shall cover his head in the church or chappell in the time of divine service, except he have some infirmity, in which case let him wear a night-cap or coife;' which word 'night-cap' is not to be understood as a covering worn in bed, but as a kind of close-fitting

(o) Quoted in Stephens, *Book of Ecclesiastical Statutes*, vol. ii. Common Prayer, vol. i. p. 377; p. 2046.

cap, as is shown by the words in the Latin Canons, '*pileolo aut ricâ.*' And I do not pronounce this particular kind of black cap, called a biretta, so worn, to be unlawful.

"With respect to the colour of the vestments, which I have pronounced to be lawful, the rubric is silent, except in the case of the alb and surplice; and the expert in such matters, who was produced as an authority by the promoter, deposed that the vestments which were used in Mr. Purchas's church were in every respect such as were in use in the church in the second year of Edward VI." (*p*).

As to colour
of vestments.

The Judicial Committee of the Privy Council, however, to which tribunal the case was taken on appeal, reversed Sir Robert Phillimore's decision as to the vestments, and held as follows: "Both in the Statute of Elizabeth and in the Rubric in question the word 'retain' seems to mean that things should remain as they were at the time of the enactment. Chasuble, Alb and Tunicle had disappeared for more than sixty years; and it has been argued fairly that this word would not have force to bring back anything that had disappeared more than a generation ago. To retain means, in common parlance, to continue something now in existence. It is reasonable to presume that the alteration was not made without some purpose; and it appears to their Lordships that the words of the Rubric, strictly construed, would not suffice to revive ornaments which had been lawfully set aside, although they were in use in the second year of Edward VI. But whether this be so or not, their Lordships are of opinion that as the Canons of 1603-4, which in one part seemed to revive the vestments, and in another to order the surplice for all ministrations, ought to be construed together, so the Act of Uniformity is to be construed with the two canons on this subject, which it did not repeal, and that the result is that the Cope is to be worn in ministering the holy communion on high feast days in Cathedrals, and Collegiate churches, and the surplice in all other ministrations. Their Lordships attach great weight to the abundant evidence which now exists that from the days of Elizabeth to about 1840, the practice is uniformly in accordance with this view; and is irreconcilable with either of the other views. Through the researches that have been referred to in these remarks a clear and abundant *expositio contemporanea* has been supplied which compensates for the scantiness of some other materials for a judgment" (*q*).

Hebbert v.
Purchas.
Judgment of
Privy Council
differing from
Court of
Archies.

*Expositio con-
temporanea.*

As to the biretta, the Privy Council said that it was carried in the hand and not worn in church; and that they should not be justified on the evidence in pronouncing this act unlawful (*q*).

Biretta.

Under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85, s. 8), a special procedure and tribunal was established for the trial of certain ecclesiastical offences, one of

*Olifton v.
Ridsdale.*

(*p*) *Elphinstone v. Purchas*, L. R., 3 Adm. & Ecc. pp. 94, 95. Vide infra, p. 730.

(*q*) *Hebbert v. Purchas*, Bullock, Special Report, Butterworths, 1871; L. R., 3 P. C. p. 605.

which is thus described—" (2) That the incumbent has within "the preceding twelve months used or permitted to be used in "such church or burial ground any unlawful ornament of the "minister of the church, or neglected to use any prescribed "ornament or vesture." Under this provision proceedings were taken against Mr. Ridsdale for, among other alleged offences, wearing the Eucharistic vestments. In the court of first instance the matter was not argued, and the judge (Lord Penzance) followed the ruling of the Privy Council in the case of Mr. Purchas, and pronounced these vestments illegal (*q*). Appeal was made to the Privy Council, which had the matter re-argued at length, but came finally to the same conclusion, viz., that they were illegal. The Advertisements were said to have been issued under the conditions required by the statute of Elizabeth, and to have had the force of law, and to have altered the vestments and made the surplice, and in cathedrals and collegiate churches the cope and surplice, the only legal Eucharistic vestments, and those only, it was said, are "retained" by the present rubric (*r*). This decision, however, was by the majority only. It has been subjected to severe criticism. One of the members of the Privy Council, Lord Selborne, has taken the unusual course of writing a book (*s*) to justify it, in answer to Mr. Parker (*t*); and the question cannot yet be considered as settled.

The canons of 1603 upon this subject are as follows:—

Canon 16. Can. 16. "In the whole divine service, and administration of the Holy Communion, in all colleges and halls in both universities, the order, form and ceremonies shall be duly observed as they are set down and prescribed in the Book of Common Prayer, without any omission or alteration."

Canon 17. Can. 17. "All masters and fellows of colleges or halls, and all the scholars and students in either of the Universities, shall in their churches and chapels, upon all Sundays, holydays, and their eves, at the time of divine service, wear surplices according to the order of the Church of England; and such as are graduates, shall agreeably wear with their surplices such hoods as do severally appertain unto their degrees."

Canon 58. Can. 58. "Every minister saying the public prayers, or ministering the sacraments, or other rites of the church, shall wear a comely surplice with sleeves, to be provided at the charge of the parish. And if any question arise touching the matter, decency, or comeliness thereof, the same shall be decided by the discretion of the ordinary. Furthermore, such ministers, as are graduates, shall wear upon their surplices at such times, such hoods as by the orders of the Universities are agreeable to their

(*q*) 1 P. D. p. 316.

(*r*) 2 P. D. p. 276.

(*s*) Notes on some passages in the Reformed Liturgical History of the Reformed English Church, 1878.

(*t*) Introduction to the History of the Successive Revisions of the book of Common Prayer. The first book of Edward VI. compared, &c., 1877.

degrees, which no minister shall wear (being no graduate) under pain of suspension. Notwithstanding it shall be lawful for such ministers as are not graduates to wear upon their surplices, instead of hoods, some decent tippet of black, so it be not silk."



SECT. 4.—Ornaments and Decorations of the Church.

Recent decisions have made it necessary to distinguish between—1, goods and furniture, ornaments in the sense of *ornamenta*, of the church, and, 2, decorations of the church.

Distinction
between orna-
ments and
decorations.

We will first consider the law as to the furniture or ornaments of the church.

The Privy Council have determined that "all the several articles used in the performance of services and rites of the church are ornaments" (u).

(u) *Westerton v. Liddell*, Moore, Special Report, pp. 157, 158. Their lordships refer to Forcellini's Lexicon for the meaning of *Ornamentum*. The ecclesiastical use of the word is clearly explained in Lyndwood:

(Walterus.) "Sint" (sc. Archidiaconi) "*Ecclesiarum Rectores*;" *et infra*. "Provideant Archidiaconi ut linteamina et alia (m) *ornamenta altaris*, sicut decet, (n) sint honesta; et libros habeat ecclesia idoneos ad psallendum pariter et legendum; et ad minus duplicia sacerdotalia vestimenta: et ut honor debitus divinis officiis in omnibus impendatur. Præcipimus etiam ut qui altari ministrat, suppellicio induatur."

(Gloss.) (m.) *Ornamenta altaris*. Qualia sunt frontilia, cortinæ, et cætera hujusmodi.

(n.) *Sicut decet*. Hæc decencia respici debet secundum qualitatem ecclesiæ et ipsius facultates; ut scilicet secundum quod ecclesia magis abundat in facultatibus, sic meliora et preciosiora habeat ornamenta (p. 52).

De Officio Archidiaconi. "Archidiaconi est prospicere ut Sacramenta ritè conserventur et administrentur, atque potissimum Eucharistia et sanctum oleum sub clavibus custodiantur. Ornamenta quoque Ecclesiarum ab eodem visitentur, et possessiones recenseantur" (pp. 49, 50).

Stephanus. "Habeant etiam Archidiaconi in scriptis redacta omnia ornamenta (t), et utensilia (u), Ecclesiarum. Vestes quoque et libros, quæ singulis annis suo faciant conspectui præsentari, ut videant quæ fuerunt adjecta per diligentiam personarum; vel quæ tempore intermedio per ipsarum malitiam vel imperitiam deperierunt."

(Gloss.) (t.) *Ornamenta*. Quæ sic dicta sunt, quia eorum cultu Ecclesiæ ornantur et decorantur. Sunt namque ornamenta secundum *Januen.* decus, gloria, laus, dignitas, sive preciosa vestimenta seu jocalia, quorum cultu Ecclesiæ decorantur.

(u.) *Utensilia*, i. e. ad utendum apta sive necessaria. Hæc autem alibi vocantur Cimelia, sicut legitur *extra de offi. Arch. c. ea quæ et 12 g. 2 Apostolicos*. Et per hæc Utensilia intelliguntur vasa Ecclesiæ quæcunque, sacrata vel non sacrata (pp. 156, 157).

See also the following constitution, "De Archidiaconis quoque statuimus ut ecclesias utiliter et fideliter visitent, de sacris vasis et (e) vestibis, et qualiter diurnis et nocturnis officiis ecclesiæ serviantur, et generaliter de temporalibus et spiritualibus inquirendo."

(Gloss.) (e.) *Vestibus*. Repete *sacris*, dictis vulgariter vestimentis. Supple, et cæteris ecclesiæ ornamentis. (Otho. Athon, p. 52.)

Inert ornaments.

They have also said, "There is a clear and obvious distinction between the presence in the church of things inert and unused, and the active use of the same things as a part of the administration of a sacrament or of a ceremony. Incense, water, a banner, a torch, a candle and candle-stick may be parts of the furniture or ornaments of a church; but the censuring of persons and things, or, as was said by the Dean of Arches, the bringing in incense at the beginning or during the celebration, and removing it at the close of the celebration of the Eucharist, the symbolical use of water in baptism, or its ceremonial mixing with the sacramental wine; the waving or carrying the banner; the lighting, cremation, and symbolical use of the torch or candle: these acts give a life and meaning to what is otherwise inexpressive, and the act must be justified, if at all, as part of a ceremonial law" (x).

Ordinary's care therein.

It is ordered by the old constitutions of the church that—"The archdeacons shall take care that the clothes of the altar be decent and in good order, that the church have fit books both for singing and reading, and at least two sacerdotal vestments" (y).

13 Edw. 1, st. 4.

By the statute of *Circumspectè agatis*, 13 Edw. 1, st. 4, "The king to his judges sendeth greeting: Use yourselves circumspectly, in all matters concerning the Bishop of Norwich and his clergy, not punishing them if they hold plea in Court Christian of such things as be mere spiritual. . . . Also if prelates do punish . . . for that the church is not conveniently decked. . . . In all cases above rehearsed the spiritual judge shall have power to take knowledge, notwithstanding the king's prohibition."

Not conveniently decked.]—For the law allows the ecclesiastical court to have consuance in this case, of providing decent ornaments for the celebration of divine service (z).

Canon 85.
Church-warden's care therein.

By Can. 85 of 1603, "The church-wardens or quest-men shall take care and provide that the churches be well and sufficiently repaired, and so from time to time kept and maintained, that the windows be well glazed and that the floors be kept paved, plain, and even, and all things there in such an orderly and decent sort, without dust, or anything that may be either noisome or unseemly, as best becometh the house of God, and is prescribed in an homily to that effect. The like care they shall take that the churchyards be well and sufficiently repaired, fenced and maintained with walls, rails, or pales, as hath been in each place accustomed, at their charges unto whom by law the same appertaineth: but especially they shall see that at every meeting of the congregation peace be well kept: and that all persons excommunicated and so denounced be kept out of the church."

(x) *Martin v. Mackonochie*, L. R.,
2 P. C. p. 365.

(y) Lind. p. 52.
(z) 2 Inst. p. 489.

By 1 Eliz. c. 2, s. 13, "Such ornaments of the church, and of the ministers thereof, shall be retained and be in use, as was in this Church of England by authority of parliament in the second year of the reign of King Edward VI., until other order shall be therein taken by the authority of the queen's majesty, with the advice of her commissioners appointed and authorized under the great seal of England for causes ecclesiastical, or of the metropolitan of this realm."

1 Eliz. c. 2.
Goods and
ornaments
in general.

Other order.]—Pursuant to this clause, the queen in the third year of her reign, granted a commission to the archbishop, bishop of London, Dr. Bill, and Dr. Haddon, to reform the disorders of chancels, and to add to the ornaments of them, by ordering the Commandments to be placed at the east end (*a*).

And by the rubric before the present Common Prayer Book, "Such ornaments of the church, and of the ministers thereof, at all times of their ministration, shall be retained and be in use, as were in this Church of England by the authority of parliament in the second year of the reign of King Edward VI." (*b*).

Rubric.

By Can. 82 of 1603, "Whereas we have no doubt, but that in all churches within the realm of England convenient and decent tables are provided and placed for the celebration of the holy communion, we appoint that the same tables shall from time to time be kept and repaired in sufficient and seemly manner, and covered in time of divine service with a carpet of silk or other decent stuff, thought meet by the ordinary of the place if any question be made of it, and with a fair linen cloth at the time of the ministration, as becometh that table, and so stand, saving when the said holy communion is to be administered: at which time the same shall be placed in so good sort within the church or chancel, as thereby the minister may be more conveniently heard of the communicants in his prayer and ministration, and the communicants also more conveniently and in more number may communicate with the said minister, and that the Ten Commandments be set up on the East end of every church and chapel, where the people may best see and read the same, and other chosen sentences written upon the walls of the said churches and chapels in places convenient; and likewise that a convenient seat be made for the minister to read service in. All these to be done at the charge of the parish."

Canon 82.
The Holy
Table.

In the case of *Newson v. Bawldry* (in the reign of Queen Anne), the case was, that the communion table of ancient time had been placed in the chancel, that there were ancient rails about it which were out of repair, that at a meeting of the majority of the parishioners a parish rate was made to replace the communion table in the chancel, and to repair the said rails, and raise the floor some steps higher for the sake of greater decency; and upon refusal to pay the rate, and a prohibition prayed, the court inclined that the parishioners might do these

Altar rails
and platform.

(*a*) Gibs. p. 201.

(*b*) Vide supra, pp. 712, 713.

Decisions as
to structure of
Holy Table.

things; for they are compellable to put things in decent order, and as to the degrees of order and decency there is no rule, but as the parishioners by a majority do agree (*b*).

In the case of *Faulkner v. Litchfield* (*c*), it was holden by the Court of Arches that a holy table of solid stone so weighty as to be irremovable except by mechanical means, was unlawful, and the decision of the Consistory Court granting a faculty to confirm the erection of such a holy table was reversed.

In the case of *Liddell v. Westerton* (*d*), the Privy Council approved of this decision, and held that "a marble slab with a *super-altare* on the side nearest the wall," standing "apart from the wall, supported upon stone carved arches, the arches resting upon a stone plinth, which is let into and embedded in the pavement on which it stands," with a cross "attached to the *super-altare*," was unlawful.

These decisions, however, so far as they turned upon the necessity of the holy table being moveable, or upon the supposed propriety of making the holy table unlike a Roman Catholic altar, will require careful reconsideration, having regard to the subsequent decision of the Privy Council authorizing a ledge or retable upon the holy table, and the subsequent decisions of the Privy Council and other courts authorizing reredoses of great splendour, whose only rationale is as an adjunct to a permanent holy table, and which would be found equally appropriate to a Roman Catholic altar (*e*).

There is also a difficulty in moving by manual labour a holy table of the usual magnitude beyond the altar rails; and altar rails are legal and usual.

When it is remembered further that the Church Building Acts provide that, where a church is built partly in one and partly in another diocese or archdeaconry, the jurisdiction over it is to be determined by the position of the altar or communion table (*f*), which would be absurd if the holy table were to be moveable, it will be seen that the last word has not been said on this matter.

In *Ridsdale v. Clifton* (*g*) the late Dr. Stephens contended, in a forcible argument on the subject of the position of the minister during the consecration prayer, that the holy table must always be placed during the celebration of the holy communion in some position away from the east wall and table-wise; but his argument found no favour with the Privy Council.

Second Holy
Tables.

In some cathedrals and large churches there have always been two holy tables, placed in different parts of the church. Of recent years several applications have been made to diocesan chancellors for faculties authorizing a second holy table. In

(*b*) 7 Mod. p. 69.

(*c*) 1 Roberts. p. 184.

(*d*) Moore's Special Report; and
see *Durst v. Masters*, 1 P. D. p. 373.

(*e*) Vide infra, p. 733.

(*f*) 59 Geo. 3, c. 134, s. 6;

2 & 3 Will. 4, c. 61.

(*g*) 2 P. D. p. 276.

some cases it is believed such faculties have been refused; but in many they have, upon special reasons being given, been granted. A reported case, which illustrates the state of the law on the subject, is that of *Re Holy Trinity Church, Stroud Green* (h).

In ancient times the bishops preached standing upon the steps of the altar; afterwards it was found more convenient to have pulpits erected for that purpose (i).

By Can. 83 of 1603, "The church-wardens or quest-men, at the common charge of the parishioners in every church shall provide a comely and decent pulpit to be set in a convenient place within the same, by the discretion of the ordinary of the place if any question do arise, and to be there seemly kept for the preaching of God's word." Canon 83.

By Can. 82 (just quoted), a convenient seat shall be made "for the minister to read service in" (j). Canon 82.
Reading desk.

The Court of Arches has in the days of compulsory church rates issued a monition against churchwardens to repair and reinstate, in its original form, the spire of a church which had been destroyed by lightning (k). Spire.

By Can. 81 of 1603, already quoted, "there shall be a font of stone in every church and chapel where baptism is to be ministered; the same to be set in the ancient usual places" (l). Canon 81.
Font.

In an act in the 27 Hen. 8, for punishment of sturdy vagabonds, it was enacted, that money collected for the poor should be kept in the common coffer or box standing in the church of every parish. Chest for
alms.

And by Can. 84 of 1603, "The church-wardens shall provide and have, within three months after the publishing of these constitutions, a strong chest, with a hole in the upper part thereof, to be provided at the charge of the parish (if there be none such already provided), having three keys, of which one shall remain in the custody of the parson, vicar, or curate, and the other two in the custody of the church-wardens for the time being: which chest they shall set and fasten in the most convenient place, to the intent the parishioners may put into it their alms for their poor neighbours. And the parson, vicar or curate shall diligently, from time to time, and especially when men make their testaments, call upon, exhort, and move their neighbours to confer and give, as they may well spare to the said chest, declaring unto them, that whereas heretofore they have been diligent to bestow much substance otherwise than God commanded, upon superstitious uses, now they ought at this time to be much more ready to help the poor and needy, knowing that to relieve the poor is a sacrifice which pleaseth God; and

(h) 12 P. D. p. 199. See also *The Vicar of St. Peter's, Eaton Square v. Parishioners*, Consistory of London, August 8th, 1894.

(i) Ayl. Par. p. 121.

(j) Vide supra, p. 723.

(k) *Viscount Maynard v. Brand*, 3 Phillim. p. 501. See also *Re Palatine Estate Charity*, 39 Ch. D. p. 54.

(l) Vide supra, p. 487.

that also, whatsoever is given for their comfort is given to Christ himself, and is so accepted of him, that he will mercifully reward the same. The which alms and devotion of the people the keepers, of the keys shall yearly, quarterly, or oftener (as need requireth) take out of the chest and distribute the same in the presence of most of the parish, or six of the chief of them, to be truly and faithfully delivered to their most poor and needy neighbours."

Basin for the offertory.

By the rubric, whilst the sentences of the offertory are in reading, "the deacons, churchwardens, or other fit person appointed for that purpose, shall receive the alms for the poor, and other devotions of the people, in a decent basin, to be provided by the parish for that purpose."

This offertory was anciently an oblation for the use of the priest, but at the Reformation it was changed into alms for the poor (*m*).

Canon 20.
Chalice and
other vessels
for the com-
munion.

By Can. 20 of 1603, already quoted (*n*), the church-wardens, with the advice and direction of the minister, are to provide "a sufficient quantity of fine white bread and of good and wholesome wine;" which wine is to be brought to the communion table "in a clean and sweet standing pot or stoop of pewter, if not of purer metal."

The parishioners shall find at their own charge the chalice or cup for the wine (*o*).

Which, says Lindwood, although expressed in the singular number, yet is not intended to exclude more than one, where more are necessary (*p*).

Bells.

The parishioners at their own charge shall find bells with ropes (*q*).

Bier.

The parishioners shall find at their own charge a bier for the dead (*r*).

Canon 80.
Common
Prayer Book.

By Can. 80 of 1603, "The church-wardens or quest-men of every church and chapel shall, at the charge of the parish, provide the Book of Common Prayer, lately explained in some few points by his majesty's authority, according to the laws and his highness's prerogative in that behalf; and that with all convenient speed, but at the furthest within two months after the publishing of these our Constitutions. And if any parishes be yet unfurnished of the Bible of the largest volume, or of the book of homilies allowed by authority, the said church-wardens shall within convenient time provide the same at the like charge of the parish."

Bible.

Bible of the largest Volume.—This was directed by the second of Lord Cromwell's Injunctions under King Henry VIII.; and in the thirty-third year of the same reign it was enforced by proclamation and a penalty of 40s. The like order for this, and

(*m*) Ayl. Par. p. 394.

(*n*) Vide supra, p. 525.

(*o*) Lind. p. 252.

(*p*) Ibid.

(*q*) Lind. p. 252; see *Pearce v. Rector of Clapham*, 3 Hagg. Eccl.

p. 16.

(*r*) Lind. p. 252.

also for the paraphrase of Erasmus, was in the Injunctions of Edward VI., and continued in those of Queen Elizabeth, and (together with the Book of Homilies) in the Canons of 1571. But what Bible is here meant by that of the largest volume is not very clear. King James the First's translation was not then made; Queen Elizabeth's Bible was called the Bishop's Bible; and the translations and reviews commonly called the Great Bible, were those of Tindal and Coverdale in the time of King Henry VIII., and that which was published by direction of Archbishop Cranmer in the reign of Edward VI. (s).

Lately explained.—To wit, in the conference at Hampton Court (t).

By 14 Car. 2, c. 4, s. 22, a true printed copy of the present Book of Common Prayer was, at the costs and charges of the parishioners of every parish church and chapelry, cathedral church, college and hall, to be provided before the feast of St. Bartholomew, 1662. 14 Car. 2, c. 4.

By Can. 80, just quoted, a Book of Homilies was to be provided. Book of Homilies.

The register books ordered by canon and by statute to be provided have been already mentioned (u). Register books.

By Can. 99 of 1603, the table of degrees of marriages prohibited, "shall be in every church publicly set up and fixed at the charge of the parish" (x). Table of degrees.

By Can. 82 of 1603, already quoted, the Ten Commandments shall be set "upon the east end of every church and chapel, where the people may best see and read the same" (y). It seems they need not be put up in the chancel (z). Ten Commandments.

By the same Canon, "Other chosen sentences" shall "be written upon the walls of the said churches and chapels, in places convenient." Sentences.

The laws as to the monuments of the dead in churches have been mentioned above (a). Monuments.

Besides what has been observed in particular, there are many other articles for which no provision is made by any special law, and therefore must be referred to the general power of the ordinary. Other goods and ornaments.

In *Butterworth and Barker v. Walker and Waterhouse* (b), it seems to have been the opinion of the Court of King's Bench that the consent of the parish is not necessary to the ordinary's ordering an organ to be erected in a church; but the parish cannot, without their consent, be charged with the expense of erecting or repairing it, or adding new ornaments. Nor can the consent of the vestry bind the parish without immemorial usage. Organs, when legally necessary, when ornamental.

(s) Gibs. p. 202.

(t) Gibs. p. 201.

(u) Vide supra, pp. 497, 498, 634.

(x) Vide supra, pp. 569, 570.

(y) Vide supra, p. 723.

(z) *Liddell v. Beal*, 14 Moo. P. C. C. p. 1.

(a) Pp. 691—696.

(b) 3 Burr. p. 1689.

In that case, the organ being provided for by voluntary contribution, a prohibition was denied.

Lord Stowell says, "It may be difficult indeed in some cases to distinguish, whether an addition of this kind to the service of the Church is to be deemed necessary or ornamental; because organs in some churches may be necessary, though in others only ornamental. In Cathedral Churches they would, I conceive, be deemed necessary, and the Ordinary might compel the Dean and Chapter to erect an organ, as proper and necessary for the service usually performed in such places" (c). So Sir J. Nicholl, in *Jay v. Webber* (d).

Existing law
as to church
ornaments.

The law respecting the authority which sanctions church ornaments is now generally understood and settled. The consent of the parishioners is not indispensably necessary, unless to charge the parish with an expense for the support of the ornament after it has been put up. But if there is no such charge incurred, the approbation of the majority of the parishioners is not necessary, nor the disapprobation binding on the ordinary. A faculty did not enjoin the raising of any rate; and if the ornament is found a burthen, it may be removed by another faculty. These were the dicta of Lord Stowell in *The Churchwardens of St. John's (Margate) v. The Parishioners, &c. of the same Parish* (e), in which case a faculty for accepting and erecting an organ was granted without a clause against future expenses being charged on the parish, and in which objections of certain of the parishioners were overruled. Of course in this, as well as in all faculties properly granted, due regard was had to the condition of the inhabitants, and the general circumstances of the parish. A like principle was adopted in *Jay v. Webber* (f), and by Sir W. Wynne in *Pierce v. The Rector, &c. of Clapham* (g). Since the abolition of compulsory church rates the consent of the parishioners is even less necessary.

Organist.

The salary and duties of the organist and his control by the minister are treated of later (h).

Other orna-
ments en-
joined by
Archbishop
Winchelsey.

There are also besides these, by an ancient constitution of Archbishop Winchelsey, divers other particulars enjoined to be found at the charge of the parish, which since the Reformation are become in part obsolete; but nevertheless, as they frequently occur in our books, it may be proper not to pass them altogether unnoticed. Which constitution is thus (i):

The parishioners shall find at their own charge "these several things following: a legend, an antiphonar, a grail, a psalter, a troper, an ordinal, a missal, a manual, a chalice, the principal vestment, with a chesible, a dalmatic, a tunic, with a choral cope,

(c) 1 Consist. p. 199.

(d) 3 Hagg. Eccl. p. 8.

(e) 1 Consist. p. 198.

(f) 3 Hagg. Eccl. p. 4.

(g) 3 Hagg. Eccl. p. 11.

(h) Vide infra, Part VI. Chap. VII. sect. 3.

(i) See the quotation from the judgment of the Privy Council, in *Liddell v. Westerton* (Moore, Special Rep. 156, 157), at p. 721, supra.

and all its appendages, a frontal for the great altar, with three towels, three surplices, one rochet, a cross for processions, a cross for the dead, a censer, a lanthorn, an hand-bell to be carried before the body of Christ in the visitation of the sick, a pix for the body of Christ, a decent veil for Lent, banners for the rogations, bells with ropes, a bier for the dead, a vessel for the blessed water, an osculatory, a candlestick for the taper at Easter, a font with a lock and key, the images in the church, the chief image in the chancel, the enclosure of the churchyard, the reparation of the body of the church within and without as well the images as glass windows, the reparation of books and vestments as occasion shall be" (*k*).

Legend.]—The book containing lessons to be read in the public service, taken out of the Holy Scripture, the lives of saints, the writings of the ancient fathers and other doctors of the church (*l*).

Antiphonar.]—From ἀντί, *contra*, and φωνή, *sonus*; so called from the alternate repetition of the psalm; one part thereof being sung by one part of the choir, and the other part thereof by the other part of the choir: and it contained not only the *antiphonæ*, as the word barely signifies, but also the invitatories, hymns, responsories, verses, collects, and whatever was said or sung in the choir, called the seven hours, or breviary, except the lessons (*m*).

Grail.]—Gradale; strictly taken, this signifies that which is sung *gradatim* after the epistle: but here it is to be understood of that whole book which contains all that was to be sung by the choir at high mass; the tracts, sequences, hallelujahs, the creed, offertory, trisagium, and the rest; as also the office for sprinkling the holy water (*n*).

Psalter.]—The book wherein the psalms are contained (*o*).

Troper.]—This contained the sequences only; which were not in all grails. The sequences were devotions used after the epistle (*p*).

Ordinal.]—The book which orders the manner of performing divine service; and seems to be the same which was called the *pie*, or *portuis*, and sometimes *portiforium* (*q*).

Missal.]—The book which contains all things pertaining to the saying of mass (*r*).

Manual.]—So called *a manu*, as being required to be constantly at hand; and it seems to be the same as the ritual; and contains all things belonging to the ministration of the sacraments and sacramentals; also the blessing of fonts, and other things by the use of the church requiring benediction; and the whole service used at processions (*s*).

(*k*) Lind. p. 251.

(*l*) Ibid.

(*m*) Ibid.

(*n*) Ibid.

(*o*) Ibid.

(*p*) Ibid.

(*q*) Ibid.; Johnson's Canons, Vol. II. Vide supra, p. 705.

(*r*) Lind. p. 251.

(*s*) Ibid.

Principal Vestment.]—That is, the best cope to be worn on the principal feasts (*t*).

Chesible.]—*Casula*; the garment worn by the priest, next under the cope; which was called also the planet. And it is said to be so called, as being a kind of cottage (as it were), or little house, covering him all over (*u*).

Dalmatic.]—A deacon's garment; so called from being at first woven in Dalmatia (*x*).

Tunic.]—The subdeacon's garment which he uses in serving the minister at the mass (*y*).

Choral cope.]—*Capa in choro*; a cope not so good as that to be used on festivals, but to be worn by the priest who presided at the saying or singing the hours (*z*).

The *capa* is said to have been called a *capiendo*, because it contains or covers the whole man (*a*).

And all its Appendages.]—To wit, the amyt, alb, girdle, maniple, and stole (*b*).

Frontal.]—A square piece of linen cloth covering the altar, and hanging down from it; otherwise called a *pall* (*c*).

For the great Altar.]—In honour of the saint to whom the church is dedicated; which was wont to be placed in the choir, as in a more solemn part of the church (*d*).

Three Towels.]—Two to be laid upon the altar under the corporal, and the third for wiping the hands (*e*).

Three Surplices.]—For the use of the three ministers of the church: the priest, deacon, and subdeacon (*f*).

Rochet.]—A Rochet is a surplice, save that it has no sleeves; and was for the clerk who assisted the priest at the mass; or for the priest when he baptize children, that his arms might be more at liberty (*g*).

A Cross for the Dead.]—To be laid on the coffin, as it seems; or on the corpse when it was brought to the church (*h*).

Pix.]—With a lid or cover (*i*).

Osculatory.]—This was a tablet or board, with the picture of Christ, the blessed Virgin, or the like; which the priest kissed himself, and gave to the people for the same purpose, after the consecration was performed, instead of the ancient kiss of charity (*k*).

Images.]—To wit, of Christ crucified, and of other saints (*l*).

The chief Image in the Chancel.]—That is, of the saint to whom the church is dedicated (*m*).

(*t*) Lind. p. 252. Vide supra, pp. 718, 719.

(*u*) Ibid.

(*x*) Ibid.

(*y*) Ibid.

(*z*) Johnson's Canons, as above.

(*a*) Lind. p. 252.

(*b*) Ibid.

(*c*) Ibid.

(*d*) Ibid.

(*e*) Ibid.

(*f*) Ibid.

(*g*) Ibid.

(*h*) Johnson's Canons, as above.

(*i*) Lind. p. 252.

(*k*) Johnson's Canons, as above.

(*l*) Lind. p. 253.

(*m*) Ibid.

A credence table has been pronounced a legal ornament of the church, being subsidiary or auxiliary to the celebration of the Eucharist, according to the rubrics which relate to that service (*n*).

Credence table.

So much with respect to the furniture or *ornamenta* of the church. We have now to consider the category of embellishments or decorations (*o*).

Embellishments or decorations.

These decorations must be not inconsistent with the doctrine of the church, and must be sanctioned by the authority of a proper faculty from the ordinary (*p*). To this category belong all architectural decorations, the cross, the reredos, moveable ledges on the holy table or super-altar, the painted window, vases of flowers and the like (*q*).

What are lawful.

The language of the Privy Council has been already adverted to. "Incense, water, a banner, a torch, a candle, a candlestick, may be part of the furniture or ornaments of the church," in which passage the word ornament is used to include furniture and decorations. The distinction, however, must, according to the present exposition of the law, be carefully observed between such articles *per se* and the ceremonial use or introduction of them into the services of the church. Thus, on the ground that it was ceremonially used, incense burnt during the celebration of the Eucharist or other portions of the service has been disallowed.

Not to be ceremonially used.

With respect to the coverings of the holy table, in the *Westerton v. Liddell* case there was objection taken, both to the use of divers coloured cloths embroidered and adorned and so used as to cover the holy table with five different coverings at different seasons of the year, and to the use of embroidered linen and lace in lieu of a simple "fair white linen cloth" at the administration of the holy communion. The judges of the Consistory of London and of the Court of Arches pronounced both these categories of coverings illegal, but the Privy Council said:—

Coloured coverings of the Holy Table lawful.

"Next, as to the embroidered cloths, it is said that the Canon orders a covering of silk, or of some other proper material, but that it does not mention, and therefore, by implication, excludes more than one covering. Their Lordships are unable to adopt this construction. An order that a Table shall always be covered with a cloth surely does not imply that it shall always be covered with the same cloth or with a cloth of the same colour or texture. The object of this Canon seems to be to secure a cloth of a sufficiently handsome description, not to guard against too much splendour. In practice, as was justly observed at the Bar, black

(*n*) *Liddell v. Westerton*, Moore, Special Report, pp. 186—188.

(*o*) Vide supra, p. 722, what is said by the Privy Council as to inert ornaments.

(*p*) Vide post, Part VI. Chap. II. sect. 6.

(*q*) *Liddell v. Westerton*, Moore, Special Report; *Elphinstone v. Purchas*, L. R., 3 Adm. & Eccl. p. 66; *Richings v. Cordingley*, *ibid.* p. 113; *Liddell v. Beal*, 14 Moo. P. C. C. p. 1.

cloths are in many churches used during Lent, and on the death of the sovereign, and some other occasions, and there seems nothing objectionable in the practice. Whether the cloths so used are suitable, or not, is a matter to be left to the discretion of the ordinary. In this case their lordships do not see any sufficient reason for interference, and they must, therefore, advise the reversal of the sentence as to the cloths used for the covering of the Lord's Table during the time of divine service, both with respect to St. Paul's and St. Barnabas.

Embroidered
and lace
cloths
unlawful.

"The last question is with respect to the embroidered linen and lace used on the Communion Table at the time of the ministration of the holy communion. The rubric and the canon prescribe the use of a fair white linen cloth, and both the learned Judges in the Court below have been of opinion that embroidery and lace are not consistent with the meaning of that expression, having regard to the nature of the table upon which the cloth is to be used. Although their Lordships are not disposed in any case to restrict within narrower limits than the law has imposed, the discretion which, within those limits, is justly allowed to congregations by the rules both of the Ecclesiastical and the Common Law Courts, the directions of the rubric must be complied with; and upon the whole their Lordships do not dissent from the construction of the rubric adopted by the present decree upon this point; and they must, therefore, advise Her Majesty to affirm it" (q).

Unlawful to
leave Holy
Table bare.

In *Elphinstone v. Purchas* (r), one of the charges was that Mr. Purchas, "when there was no administration of the holy communion, caused or permitted the holy table to be and remain during divine service without any decent covering, such as is enjoined and required by the 82nd Canon of the church."

Sir Robert Phillimore said:

"The leaving of the holy table wholly bare and uncovered during divine service is, I believe, a practice without warrant from primitive use or custom; but it is certainly contrary to the 82nd Canon, which governs this question, and is therefore illegal."

Candlesticks.

It was held by the judge of the Consistory Court in the case of *Westerton v. Liddell*, that candlesticks upon the holy table were legal decorations (s).

Flowers.

Vases of flowers on the holy table were holden lawful in *Elphinstone v. Purchas* (r).

Super-altar.

A moveable ledge of wood or super-altar on which two candlesticks were placed, and which was itself placed at the back of the holy table, was decided to be lawful in *Liddell v. Beal* (t).

Cross.

The cross was holden to be lawful when on a chancel screen in *Liddell v. Westerton* (u); when placed in the centre compart-

(q) Moore's Special Report, pp. 188, 189.

(r) L. R., 3 Adm. & Eccl. p. 66.

(s) Moore, Special Report, p. 71.

(t) 14 Moo. P. C. C. p. 1. See *Richings v. Cordingley*, L. R., 3 Adm. & Eccl. p. 113.

(u) Moore's Special Report, p. 175.

ment of the east window of the chancel in *Liddell v. Beal* (v); and when on the chancel screen in *Bradford v. Fry* (x).

A wooden cross was holden unlawful when attached to the Holy Table in *Liddell v. Westerton* (y); and so was a moveable cross of wood upon a ledge upon, or apparently upon, the holy table in *Martin v. Durst* (z). This last decision, in which the Privy Council reversed Sir Robert Phillimore, excited at the time a good deal of surprise.

The result seems to be that a cross is lawful everywhere except on the holy table or on a structure which itself is or appears to be on the holy table. There can be no doubt about the fact of the prohibitory decisions; but it is not easy to discover any principle on which they rest.

There is no doubt about the lawfulness of a chancel screen, with or without gates. One such was allowed, though regretfully, by Dr. Lushington in *Westerton v. Liddell* (a). Since then there have been several cases; but diocesan chancellors have occasionally thought gates unnecessary or inexpedient, and have refused faculties for them (b). Chancel screen.

The lawfulness of a reredos at the back of the holy table, though, as already pointed out, it implies that the holy table remains always in one place, has been assumed as past question in a number of recent suits. The controversy has been as to the lawfulness of putting sculptured figures or images upon the reredos, or as to the lawfulness of particular figures or representations. Reredos.

Till recently there was very little in the way of judicial decisions about images. Images.

There was *Pricket's Case* (c), in which a man was bound over by Wray, C.J., for breaking what were said to be superstitious pictures in the window of a church, without licence from the ordinary. *Pricket's Case.*

There was a case in 1639, when the parishioners of All Hallows', Barking, complained to the bishop of certain pictures and images contrary, as they said, to the laws of the church having been set over the font; and in which, by consent, the chancellor ordered the pictures to be taken down (d). *All Hallows', Barking, Case.*

And there was a case in the diocese of Lincoln, where Bishop Barlow interfered, in which the validity of a reredos, with painted representations of the Apostles, was uphelden by the Court of Arches. This case, *Cooke v. Tallents*, which was discovered in the records of the Court, and to which the Editor was guided by Bishop Barlow's pamphlet, was relied upon in the Court of Arches in *Boyd v. Phillpotts* (e). The Privy Council, *Cooke v. Tallents.*

(v) 14 Moo. P. C. C. p. 1.

(x) 4 P. D. p. 93.

(y) Moore's Special Report, p. 186.

(z) 1 P. D. pp. 123, 373.

(a) Moore's Special Report, p. 71.

(b) See *Bradford v. Fry*, 4 P. D. p. 93; *Re St. Augustine, Haggerston*,

ibid. p. 111; *Re St. Agnes*, 11 P. D. p. 1; *Rector of St. Andrews, Romford v. All persons* (1894), P. p. 220; *Vicar of St. James', Norland v. Parishioners* (1894), P. p. 256.

(c) Cro. Jac. p. 367.

(d) Gibs. App. p. 1465.

(e) L. R., 4 Adm. & Eccl. p. 297,

being satisfied with the correctness of the decision of the Arches Court as to the lawfulness of the reredos, did not hear counsel in support of it, and then lapsed into the unfortunate error of treating the decision in *Cooke v. Tallents* as of no value, as being a "consent" judgment, which it was not.

There has been also preserved on the statute book an act, 3 & 4 Edw. 6, c. 10, "for the abolishing and putting away divers books and images."

St. Margaret's Westminster.

About 1761 the question arose as to the validity of images in painted windows, when the celebrated window in St. Margaret's, Westminster, having the scene of the Crucifixion, was put up with funds provided by parliament. This case gave rise to much discussion and to litigation, in which the main point was, perhaps, not distinctly determined, but in which victory rested with those who contended for the window, which still remains (*f*).

Boyd v. Phillpotts.

The question of images, however, came up for serious discussion and decision in the Exeter Reredos Case (*g*), in which a reredos in the cathedral of Exeter, made of carved stone having sculptured representations in high relief of the Ascension, the Transfiguration and the Descent of the Holy Ghost on the day of Pentecost, ornamented with figures of angels and a cross, was holden unlawful by Sir Henry Keating, sitting as assessor to the bishop at a visitation, but was on appeal holden lawful by Sir Robert Phillimore in the Court of Arches, and finally by the Privy Council.

Hughes v. Edwards.

In the Denbigh Reredos Case (*h*), a stone reredos having in high relief the three figures of our Lord upon the Cross, the Virgin and St. John, was holden by Lord Penzance lawful and fit to be authorized by a faculty.

Reg. v. The Bishop of London.

In the quite recent case of *Regina v. The Bishop of London* (*i*), a mandamus was applied for to compel the Bishop of London to transmit a representation under the Public Worship Regulation Act, 1874, so that the legality of the reredos in St. Paul's Cathedral might be tried.

In that case the representation stated that the dean and chapter had (1) "introduced into the said cathedral church, and set upon the altar-piece or reredos therein, an image or sculptured subject representing our Lord upon the Cross in a conspicuous position immediately above the communion table, the figure of our Lord being of the height of five feet or thereabouts."

(2.) "That the said image or sculptured subject is so constructed as to have the appearance of such an altar crucifix as

cited at p. 372: 6 P. C. p. 435. See Bp. Barlow's Works, A.D. 1692.

(*f*) Wilson, Ornaments of Churches considered; Rothery's Return, No. 171. See also *Boyd v. Phillpotts*, L. R., 4 Adm. & Eccl. at p. 370.

(*g*) *Boyd v. Phillpotts*, L. R., 4

Adm. & Eccl. p. 297; on appeal, *Phillpotts v. Boyd*, L. R., 6 P. C. p. 435.

(*h*) *Hughes v. Edwards*, 2 P. D. p. 361. Query, see *Re St. Lawrence Pitington*, 5 P. D. p. 131.

(*i*) 23 Q. B. D. p. 414; 24 Q. B. D. p. 213.

was used in the Church of England immediately before the Reformation, so as to answer the purposes for which such a crucifix was intended."

(3.) "That the dean and chapter had introduced into the said cathedral church, and set upon the said altar-piece or reredos therein, an image or sculptured subject representing the blessed Virgin Mary with the child in her arms, in a conspicuous position a few feet above the first-mentioned image or sculptured subject, the figure of the Blessed Virgin being of the height of five feet six inches or thereabouts."

The Bishop gave in substance as his reason for refusing to further the proceedings, that the case fell within the principle of the Exeter Reredos case; and this reason, though holden insufficient by the Queen's Bench Division, was on the contrary holden sufficient, and to show a good exercise of episcopal discretion, by the Court of Appeal and by the House of Lords.

On the other hand, in the Folkestone case, pictures of Stations of the Cross were considered by Lord Penzance to be unlawful (*k*), evidence having been given by a Roman Catholic Ecclesiastic that they were connected with a set of devotions which Lord Penzance considered superstitious; and in the same case, Lord Penzance first, and the Privy Council on appeal, held that a metal *crucifix* on the top of the chancel screen which had been put up without a faculty must be taken down, both as put up without a faculty and as a decoration for which in the circumstances of that church no faculty ought to be granted, as it was liable to be abused (*l*).

Clifton v. Ridsdale.

These last words contain the principle by which the Exeter Reredos case, the Denbigh Reredos case, and the crucifix in the Folkestone case were respectively tested; and the result is that all images in stained glass, paintings or sculpture, are lawful unless they are liable to be abused by superstitious devotion.

Principle of decisions.

Another form of architectural decoration in connection with the Holy Table, as appropriate to the basilica form of church as a reredos is to the ordinary Gothic church, is a Baldachin or canopy. A few are in existence in churches; but in the one case in which a faculty for a baldachin was applied for and opposed, the Chancellor of London refused a faculty (*m*), basing his judgment both on the very substantial ground that a large majority of the parishioners opposed, and on the further ground that baldachins were unlawful. This opinion, however, was mainly founded upon a supposed connection between such canopies and portable canopies used in processions in times before the Reformation, a connection which it is respectfully suggested by the Editor will be found on further inquiry to be verbal only. The case came upon both judge and counsel as

Baldachin.

(*k*) *Clifton v. Ridsdale*, 1 P. D. P. D. p. 276.
p. 316.

(*m*) *White v. Bowron*, 4 Adm. &

(*l*) *Ibid.*; *Ridsdale v. Clifton*, 2 Eccl. p. 207.

a matter of much novelty; and the actual refusal of the faculty was unquestionably well founded upon the ground of the opposition of the parishioners.

Proceedings
under P. W.
R. Act.

The Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8, gives power to take proceedings if the complainants are of opinion—" (1) That in such church any alteration in or addition to the fabric ornaments, or furniture thereof has been made without lawful authority, or that any decoration forbidden by law has been introduced into such church. . . . Provided that no proceedings shall be taken under this act as regards any alteration in or addition to the fabric of a church, if such alteration or addition has been completed five years before the commencement of such proceedings" (m).



SECT. 5.—*Attendance on and Behaviour at Public Worship.*

Due attend-
ance on the
public
worship.

The law of the Church of England provides that there shall be public worship in her churches twice every day, as well as on every holyday, under which category Sundays are included.

Civil penalties have been inflicted by the law of the state upon lay parishioners absent without reasonable let from their parish church on holydays, but not upon ordinary week days (n). But the duty of performing daily service in church has been again recognized by a recent statute (o).

5 & 6 Edw. 6,
c. 1.

On pain of
punishment
by the cen-
sures of the
church.

By 5 & 6 Edw. 6, c. 1, s. 1, all persons "shall diligently and faithfully having no lawful or reasonable excuse to be absent endeavour themselves to resort to their parish church or chapel accustomed, or upon reasonable let thereof, to some usual place where common prayer and such service of God shall be used in such time of let, upon every Sunday and other days ordained and used to be kept as holydays; and then and there to abide orderly and soberly during the time of the common prayer, preaching or other service of God:" on pain of punishment by the censures of the church.

Sect. 2. "And for the due execution hereof, the King's most excellent Majesty, the lords temporal, and all the commons in this present assembled, doeth in God's name require and charge all the archbishops, bishops, and other ordinaries, that they shall endeavour themselves to the utmost of their knowledge, that the due and true execution hereof may be had throughout their dioceses and charges, as they will answer before God for such evils and plagues wherewith Almighty God may justly punish his people for neglecting this good and wholesome law."

9 & 10 Vict.
c. 59.

By 9 & 10 Vict. c. 59, s. 1, it is provided that this first section

(m) Vide infra, Part IV. Chap. IX. B. D. p. 671.

(n) See *Taylor v. Timson*, 20 Q. (o) 34 & 35 Vict. c. 37.

“shall be repealed so far as the same affects persons dissenting from the worship or doctrines” of the church, “and usually attending some place of worship than the Established Church;” and further that “no pecuniary penalty shall be imposed upon any person for his so absenting himself as aforesaid.”

By Can. 90 of 1603 the church-wardens or quest-men of every parish, and two or three or more discreet persons in every parish to be chosen for side-men or assistants by the minister and parishioners, if they can agree (otherwise to be appointed by the ordinary of the diocese), shall diligently see that all the parishioners duly resort to their church upon all Sundays and holy-days, and there continue the whole time of divine service; and none to walk or to stand idle or talking in the church or in the churchyard or church-porch during that time; and all such as shall be found slack or negligent in resorting to the church (having no great or urgent cause of absence) they shall earnestly call upon them; and, after due monition (if they amend not), they shall present them to the ordinary of the place. The choice of which persons, viz., church-wardens or quest-men, side-men or assistants, shall be yearly made in Easter week.

Canon 90.
All persons
shall resort to
church.

Orderly
behaviour
during divine
service.

Among the constitutions of Egbert, Archbishop of York, one is, that whilst the minister is officiating, if any person shall go out of the church, he shall be excommunicated; and this is taken from a canon of the fourth council of Carthage (*p*).

By Can. 18 of 1603, “No man shall cover his head in the church or chapel in the time of divine service, except he have some infirmity; in which case let him wear a night-cap, or coif. All manner of persons then present shall reverently kneel upon their knees when the general Confession, Litany, and other prayers are read; and shall stand up at the saying of the Belief, according to the rules in that behalf prescribed in the Book of Common Prayer: and likewise when in time of divine service the Lord Jesus shall be mentioned, due and lowly reverence shall be done by all persons present, as it hath been accustomed; testifying by these outward ceremonies and gestures their inward humility, Christian resolution, and due acknowledgment that the Lord Jesus Christ, the true eternal Son of God, is the only Saviour of the world, in whom alone all the mercies, graces, and promises of God to mankind for this life, and the life to come are fully and wholly comprised. None, either man, woman, or child, of what calling soever, shall be otherwise at such time busied in the church, than in quiet attendance to hear, mark, and understand that which is read, preached, or ministered; saying in their due places audibly with the minister, the Confession, the Lord’s Prayer, and the Creed; and making such other answers to the public prayers as are appointed in the Book of Common Prayer: neither shall

Canon 18.

they disturb the service or sermon, by walking, or talking, or any other way; nor depart out of the church during the time of divine service or sermon, without some urgent or reasonable cause.”

Cover his Head.—In the 18 Car. 2, an action of trespass for assault and battery was brought against a churchwarden: who pleaded that the plaintiff had his hat on in time of divine service, and that he desired him to put it off, and upon refusal took it off, and delivered it into his hand. And all the court held that the plea was good; except Twisden, who conceived that all that the churchwarden could do, was to present him to the spiritual court; though it is very apparent how necessary an immediate remedy is, in case of this or the like disorders committed in the worship of God. The court also said, that the churchwardens may chastise boys playing in the churchyard, and much more in the church (*g*).

Canon 19.
Duties of churchwardens during time of service.

By Can. 19 of 1603, “The church-wardens or quest-men and their assistants, shall not suffer any idle persons to abide either in the church-yard or church-porch, during the time of divine service or preaching, but shall cause them either to come in or to depart.”

Canon 85.

By Can. 85, already given in full (*r*), “The church-wardens or quest-men shall . . . see that in every meeting of the congregation peace be well kept; and that all persons excommunicated, and so denounced, be kept out of the church.”

Canon 90.

By Can. 90, already given in full (*s*), “The church-wardens or quest-men” are to see that none do “walk, or stand idle or talking in the church, or in the church-yard, or the church-porch, during the time of divine service.”

Canon 111.

By Can. 111 of 1603, “In all visitations of bishops and archdeacons, the church-wardens or quest-men and side-men shall truly and personally present the names of all those which behave themselves rudely or disorderly in the church, or which, by untimely ringing of bells, by walking, talking, or other noise, shall hinder the minister or preacher.”

Lord Stowell's observations.

Churchwardens (Lord Stowell observes) may and ought to repress all indecent interruptions of the service by others, and desert their duty if they do not. “And if a case could be imagined in which even a preacher himself was guilty of any act grossly offensive, either from natural infirmity or disorderly habits, I will not say that the churchwardens or even private persons might not interpose to preserve the decorum of public worship. But that is a case of instant and overbearing necessity that supersedes all ordinary rules” (*t*).

1 Mar. sess. 2, c. 3.

By 1 Mar. sess. 2, c. 3, “If any person or persons of their own power and authority . . . shall willingly and of purpose

(*g*) *Gibs.* 294; *Haw v. Planner*, 2 *Keb.* p. 124; *Sid.* p. 301; 1 *Saund.* p. 13; 2 *Hawk.* p. 27; see *Glever v. Hynde*, 1 *Mod.* p. 168.

(*r*) *Vide supra*, p. 722.

(*s*) *Vide supra*, p. 737.

(*t*) *Hutchins v. Denziloe and Loveland*, 1 *Consist.* p. 174.

by open and overt word fact act or deed, maliciously or contemptuously molest let disturb vex or trouble, or by any other unlawful ways or means disquiet or misuse any preacher or preachers that . . . shall be licensed, allowed or authorized to preach by the Queen's Highness, or by any archbishop or bishop of this realm, or by any other lawful ordinary, or by any of the universities of Oxford and Cambridge, or otherwise lawfully authorized or charged by reason of his or their cure, benefice or other spiritual promotion or charge, in any of his open sermon preaching or collation that he or they shall make, declare, preach, or pronounce in any church chapel churchyard or in any other place or places used, frequented or appointed . . . to be preached in ; ”

Any person molesting any preacher,

Or “ shall maliciously, willingly or of purpose molest let disturb vex disquiet or otherwise trouble, any parson vicar parish priest or curate or any lawful priest preparing saying doing singing ministering or celebrating the mass, or other such divine service, sacraments or sacramentals as was most commonly frequented and used in the last year of the reign of the late sovereign lord King Henry the Eighth, or that at any time hereafter shall be allowed, set forth, or authorized by the Queen's Majesty ; ”

or any priest performing divine service,

Or “ shall contemptuously unlawfully or maliciously, of their own power or authority, pull down deface spoil abuse break or otherwise unreverently handle or order the most blessed, comfortable, and holy sacrament of the body and blood of our Saviour Jesus Christ, commonly called the sacrament of the altar, being or that shall be in any church or chapel, or in any other decent place, or the pix or canopy wherein the same sacrament is or shall be ; or unlawfully contemptuously or maliciously of their own power and authority, pull down deface spoil or otherwise break any altar or altars crucifix or cross that now or hereafter shall be in any church chapel or churchyard : ” that then “ every such offender or offenders in any the premises, his or their aider procurer or abettor aiders procurers or abettors immediately and forthwith ” after the offence committed, shall be apprehended by any constable or churchwarden of the parish, town or place where the offence shall be committed, or by any other officer, “ or by any other person then being present at the time of the offence or offences so unlawfully committed.”

or injuring the Holy Sacrament, or any cross, &c.,

shall be apprehended,

Which person so apprehended shall with convenient speed be carried to a justice of the peace, who shall, upon due accusation by the apprehender or other person of such offence, commit him in safe keeping and custody as by his discretion shall be thought meet ; and within six days next after the said accusation made, the said justice, with one other justice, shall diligently examine the offence.

and taken before a justice,

And if they shall find him guilty, by two witnesses or by confession, they shall immediately with convenient speed commit him to gaol for three months and further to the next quarter

and shall be imprisoned for three months and

till then next
quarter ses-
sions, &c.

sessions to be holden next after the end of the said three months. At which quarter sessions, the person so committed to gaol, upon his reconciliation and repentance in that behalf, before the said justices at the said sessions, shall be discharged out of prison, upon sufficient surety of his good abearing and behaviour, to be then and there taken by the said justices, for one whole year then next ensuing : And if he will not be reconciled and repent at the said quarter sessions, then he shall immediately in time convenient be further committed to the said gaol by the said justices or the more part of them, there to remain without bail until he shall be reconciled and be penitent for the said offence.

Sects. 2 and 3 inflict a penalty on rescue or escape. Sect. 4 gives all justices jurisdiction. Sect. 5 saves the ecclesiastical jurisdiction. And sect. 6 provides that offenders shall not be punished ecclesiastically and civilly.

Or other such Divine Service.]—It has been resolved that the disturbance of a minister in saying the present common prayer is within this statute ; for the express mention of such divine service as should afterwards be authorized by Queen Mary, implicitly includes such also as should be authorized by her successors ; for since the king never dies, a prerogative given generally to one goes of course to others (*u*).

Shall be apprehended.]—In the case of *Glover v. Hind*, in 25 Car. 2, where an action of trespass of assault and battery was brought, for laying hands on the disturber, it was declared by the court, that at the common law a person disturbing divine service might be removed by any other person there present, as being all concerned in the service of God that was then performing ; so that the disturber was a nuisance to them all, and might be removed by the same rule of law that allows a man to abate a nuisance (*x*).

In 15 Car. 2, the court refused to grant a certiorari to remove an indictment at the sessions against the defendant for not behaving himself reverently and modestly at the church during divine service : because although the offence is punishable by ecclesiastical censures, yet they judged it a proper cause within cognizance of the justices of the peace, and indictable (*y*).

1 W. & M.
c. 18.

By 1 W. & M. c. 18, s. 15, "If any person or persons . . . shall willingly and of purpose maliciously or contemptuously come into any cathedral or parish church chapel or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher," he shall, on proof thereof before a justice of the peace by two or more witnesses, "find two sureties to be bound by recognizance in the sum of 50*l*., and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions ; and upon conviction of

(*u*) 2 Hawk. p. 28.

(*x*) Gibs. p. 304 ; *S. C.*, *nom*.

Glover v. Hynde, 1 Mod. p. 168.

(*y*) *Rex v.* —, 1 Keb. 491.

the said offence at the said general or quarter sessions, shall suffer the pain and penalty of 20*l*."

It has been decided that an indictment upon this act at the quarter sessions may, before verdict, be removed by certiorari into the Court of King's Bench, and that upon conviction of several defendants each is liable to the penalty of 20*l*. (z).

By 1 Geo. 1, st. 2, c. 5, s. 4, "If any persons unlawfully, riotously and tumultuously assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any church or chapel the same shall be adjudged felony without benefit of clergy." 1 Geo. 1, st. 2, c. 5.

The latest and most important statute for the preservation of order and decency in church was passed in 1860. By 23 & 24 Vict. c. 32, it is enacted as follows:— 23 & 24 Vict. c. 32.

Sect. 2. "Any person who shall be guilty of riotous, violent, or indecent behaviour in England or Ireland in any cathedral church, parish or district church or chapel of the Church of England and Ireland, or in any chapel of any religious denomination, or in England in any place of religious worship duly certified under the provisions of" 18 & 19 Vict. c. 81, "whether during the celebration of divine service or at any other time, or in any churchyard or burial ground, or who shall molest, let, disturb, vex or trouble, or by any other unlawful means disquiet or misuse any preacher duly authorized to preach therein, or any clergyman in holy orders ministering or celebrating any sacrament, or any divine service, rite, or office, in any cathedral, church, or chapel, or in any churchyard or burial ground, shall, on conviction thereof before two justices of the peace, be liable to a penalty of not more than five pounds for every such offence, or may, if the justices before whom he shall be convicted think fit, instead of being subjected to any pecuniary penalty, be committed to prison for any time not exceeding two months." Penalty for making a disturbance in churches, chapels, churchyards, &c.

Sect. 3. "Every such offender in the premises after the said misdemeanor so committed immediately and forthwith may be apprehended and taken by any constable or churchwarden of the parish or place where the said offence shall be committed, and taken before a justice of the peace of the county or place where the said offence shall have been so committed, to be dealt with according to law." Offenders may be, immediately after offence committed, apprehended, &c.

Sect. 4 gives a power of appeal from a conviction to the quarter sessions. Sect. 5 repeals, except as to persons in holy orders, 5 & 6 Edw. 6, c. 4. Sect. 6 provides that nothing in this act shall be taken to repeal or alter the statutes 1 Mar. sess. 2, c. 3, and 1 W. & M. c. 18, s. 15; and sect. 7 expressly saves all the power possessed by the ordinary over the fabric of any church, or over the churchyard or burial ground connected therewith. Other provisions.

(z) *Rex v. Hube*, 5 T. R. p. 542.

What is
meant by
"celebrating
divine
service."

In *Cope v. Barber* (a) it was decided that a priest collecting the offertory during the reading of the sentences by another clergyman is not "celebrating divine service" within the meaning of sect. 2, and that therefore persons obstructing him in the collection are not liable for molesting letting disturbing vexing or troubling him under this last statute.



SECT. 6.—*Acts of Uniformity.*

Liturgy
before the
Acts of
Uniformity.

The Latin services, as they had been used in England before, continued in all King Henry the Eighth's reign without any alteration; save some erasures of collects for the pope, and for the office of Thomas Becket and of some other saints, whose days were by the king's injunctions no more to be observed; but those erasures or deletions were so few, that the old mass books, breviaries, and other rituals, did still serve without new impressions (b).

Act of Uni-
formity of
2 & 3 Edw. 6.

In the second year of King Edward the Sixth, a liturgy was established by the statute of 2 & 3 Edw. 6, c. 1, as follows:

"Where of long time there hath been had, in this realm of England and in Wales divers forms of common prayer, commonly called the service of the church, that is to say, the use of Sarum, of York, of Bangor and of Lincoln; and besides the same, now of late much more divers and sundry forms and fashions have been used in the cathedral and parish churches of England and Wales, as well concerning the mattens or morning prayer, and the evensong, as also concerning the holy communion commonly called the mass, with divers and sundry rites and ceremonies concerning the same, and in the administration of other sacraments of the church; and as the doers and executors of the said rites and ceremonies in other form than of late years they have been used were pleased therewith, so others not using the same rites and ceremonies were thereby greatly offended; and albeit the King's Majesty with the advice of his most entirely beloved uncle the Lord Protector and other of his Highness' council, hath hitherto divers times assayed to stay innovations or new rites concerning the premisses, yet the same hath not had such good success as his Highness required in that behalf; whereupon his Highness . . . being pleased to bear with the frailty and weakness of his subjects in that behalf, of his great clemency hath not been only content to abstain from punishment of those that have offended in that behalf . . . but also to the intent a uniform, quiet and godly order should be had concerning

(a) L. R., 7 C. P. p. 393; 41 L. J., M. C. p. 137. (b) Gibs. p. 259.

the premisses, hath appointed the Archbishop of Canterbury, and certain of the most learned and discreet bishops and other learned men of this realm to consider and ponder the premisses, and thereupon having as well eye and respect to the most sincere and pure Christian religion taught by the Scripture, as to the usages in the primitive church, should draw and make one convenient and meet order, rite and fashion of common and open prayer and administration of the sacraments to be had and used in his Majesty's realm of England and in Wales; the which at this time by the aid of the Holy Ghost, with one uniform agreement is of them concluded set forth and delivered to his Highness . . . in a book, entitled 'The Book of the Common Prayer and administration of the Sacraments and other Rites and Ceremonies of the Church, after the use of the Church of England:' Wherefore the lords spiritual and temporal, and the commons, in this present parliament assembled, considering as well the most godly travel of the King's Highness, of the Lord Protector and other of his Highness' council in gathering and collecting the said archbishops, bishops, and learned men together, as the godly prayers orders rites and ceremonies in the said book mentioned, and the considerations of altering those things which he altered, and retaining those things which he received in the said book, but also the honour of God, and great quietness which by the grace of God shall ensue upon the one and uniform rite and order in such common prayer and rites and external ceremonies to be used throughout England and Wales . . . do give to his highness most hearty and lowly thanks for the same, and humbly pray that it may be ordained and enacted by his majesty, with the assent of the lords and commons in parliament assembled, and by authority of the same, . . . that all and singular ministers in any cathedral or parish church, or other place within this realm . . . shall . . . be bounden to say and use the mattens evensong celebration of the Lord's Supper, commonly called the mass, and administration of each of the sacraments, and all their common and open prayer, in such order and form as is mentioned in the same book, and none other or otherwise."

And by the same act divers regulations were made to establish the said book, which are yet in force, not for the establishment of that book, but for the establishment of the present Book of Common Prayer enjoined by the Act of Uniformity of 14 Car. 2, c. 4, and which therefore will be inserted in their due course. For, that it may be observed once for all, the regulations made by the several acts of uniformity for the establishing of the several respective liturgies, are all brought over and enforced by the last act of uniformity for the establishing of the present Book of Common Prayer, by this clause following, viz.—

14 Car. 2, c. 4, s. 20, "The several good laws and statutes of this realm which have been formerly made and are now in force for the uniformity of prayer and administration of the

Regulations of the act enure to establishment of present Prayer Book.

14 Car. 2, c. 4, s. 20.

sacraments . . . shall stand in full force and strength to all intents and purposes whatsoever, for the establishing and confirming of the said book . . . hereinbefore mentioned to be joined and annexed to this act, and shall be applied, practised and put in ure for the punishing of all offences contrary to the said laws, with relation to the book aforesaid, and no other."

Act of Uniformity of the
5 & 6 Edw. 6.

Thus stood the liturgy until the fifth year of King Edward the Sixth. In which year there was appended to an act, enforcing the due attendance of persons at church, the following section:—

5 & 6 Edw. 6, c. 1, s. 4. "And because there hath risen in the use and exercise of common service in the Church heretofore set forth, divers doubts for the fashion and manner of the ministration of the same, rather by the curiosity of the ministers and mistakers, than of any other worthy cause: therefore, as well for the more plain and manifest explanation hereof, as for the more perfection of the said order of common service, in some places where it is necessary to make the same prayers and fashion of service more earnest and fit to stir Christian people to the true honouring of Almighty God, the king's most excellent Majesty, with the assent of the lords and commons in parliament assembled, and by the authority of the same, hath caused the aforesaid order of common service, intituled, *The Book of Common Prayer*, to be faithfully and godly perused, explained and made fully perfect, and by the aforesaid authority hath annexed and joined it so explained and perfected to this present statute, adding also a form and manner of making and consecrating of archbishops bishops priests and deacons, to be of like force authority and value, as the same like aforesaid book entitled the *Book of Common Prayer* was before, and to be accepted, received, used, and esteemed in like sort and manner; and with the same clauses of provisions and exceptions to all intents, constructions and purposes as by the act of the 2 & 3 Edw. 6, c. 1, was ordained and limited, expressed and appointed, for the uniformity of service and administration of the sacraments throughout the realm, upon such several pains as in the said act of parliament is expressed. And the said former act to stand in full force and strength to all intents and constructions, and to be applied, practised and put in ure, to and for the establishing of the *Book of Common Prayer* now explained and hereunto annexed, and also the said form of making archbishops, bishops, priests and deacons hereunto annexed, as it was for the former book."

Liturgy
under
Queen Mary.

This liturgy was abolished by Queen Mary, who, having called in and destroyed the aforesaid erased books of King Henry the Eighth, required all parishes to furnish themselves with new complete books, and enacted that the service should stand as it was most commonly used in the last year of the reign of the said King Henry the Eighth (c).

And for a month and more after Queen Mary's death, the service continued as before, nothing being forbidden but the Elevation; but on the 27th day of December following, Queen Elizabeth set forth a proclamation, to charge and command all manner of her subjects, as well those that be called to the ministry of the church, as all others, that they do forbear to preach or teach, or to give audience to any manner of doctrine or preaching, other than to the gospels and epistles, commonly called the gospel and epistle of the day, and to the Ten Commandments in the vulgar tongue, without exposition or addition of any manner of sense or meaning to be applied or added; or to use any other manner of public prayer, rite or ceremony in the church, but that which is already used, and by law received, or the common Litany used at this present in her majesty's own chapel, and the Lord's Prayer and the Creed in English; until consultation may be had by parliament, by her majesty and her three estates of this realm, for the better conciliation and accord of such causes, as at this present are moved in matters and ceremonies of religion (*d*).

Interval
before Queen
Elizabeth's
Act of
Uniformity.

After which, in the first year of the same queen, a liturgy was established by act 1 Eliz. c. 2, in this wise:—After referring to the second Prayer Book of Edward VI. the act proceeds in sect. 4, "All and singular ministers in any cathedral or parish church, or other place, . . . shall . . . be bounden to say and use the mattens evensong celebration of the Lord's Supper, and administration of each of the sacraments, and all their common and open prayer, in such order and form as is mentioned in the said book so authorized by parliament in the " 5 & 6 Edw. 6, "with one alteration or addition of certain lessons to be used on every Sunday in the year, and the form of the Litany altered and corrected, and two sentences only added in the delivery of the sacrament to the communicants, and none other or otherwise."

Act of Uni-
formity of
1 Eliz. c. 2.

Then there was a proviso in sect. 25 as to the "ornaments of the church, and of the ministers thereof, which has been dealt with at length in sections 3 and 4 of this chapter (*e*).

Also in sect. 26, there is this further proviso: "And also that if there shall happen any contempt or irreverence to be used in the ceremonies or rites of the church by the misusing of the orders appointed in this book, the queen's majesty may by the like advice of the said commissioners or metropolitan, ordain and publish such further ceremonies or rites as may be most for the advancement of God's glory, the edifying of His church, and the due reverence of Christ's holy mysteries and sacraments."

The Form of the Litany altered and corrected.—By the omission of the clause, "from the tyranny of the Bishop of Rome and all his detestable enormities:" which had been in the second and in the fifth of Edward the Sixth (*f*).

(*d*) Gibs. pp. 267, 268.

(*f*) Gibs. p. 268.

(*e*) Vide *supra*, pp. 712, 723.

Two Sentences only added in the delivery of the Sacraments.]—Of the two forms now used at the delivery of the elements the first part of each (to the word “life” exclusive) was in the book of the second year of King Edward the Sixth, but not the second part: but in the book of the fifth year, was the second part without the first: and the alteration made by virtue of this act, was the inserting of both as they now stand (*g*).

Order shall be taken by authority of the Queen’s Majesty, with the advice of her Commissioners.]—Two years afterwards, by virtue of this clause, the queen issued her commission to the archbishop, and three others, to peruse the order of the lessons throughout the whole year, and to cause some new calendars to be imprinted; which were finished and sent to the several bishops to see them observed in their dioceses in the month of February, 1560 (*h*).

Canon 36.

Canon 36, of 1603, required the subscription of all ministers to an article expressive of assent to the Book of Common Prayer. This Canon and the amended Canon of 1865 have been already mentioned (*i*).

Canon 56.

And by Canon 56 of 1603, “Every minister being possessed of a benefice that hath cure and charge of souls, although he chiefly attend to preaching, and hath a curate under him to execute the other duties which are to be performed for him in the church, and likewise every other stipendiary preacher that readeth any lecture, or catechizeth, or preacheth in any church or chapel, shall twice at the least every year read himself the divine service upon two several Sundays, publicly and at the usual times, both in the forenoon and afternoon, in the church which he so possesseth, or where he readeth, catechizeth, or preacheth, as is aforesaid, and shall likewise as often in every year administer the sacraments of baptism (if there be any to be baptized), and of the Lord’s supper, in such manner and form, and with the observation of all such rites and ceremonies as are prescribed by the Book of Common Prayer in that behalf: which if he do not accordingly perform, then shall he that is possessed of a benefice (as before) be suspended; and he that is but a reader, preacher or catechizer, be removed from his place by the bishop of the diocese; until he or they shall submit themselves to perform all the said duties in such manner and sort as before is prescribed.”

King James’s
provisions and
additions.

After the passing of these canons, King James I., in the first year of his reign, on the assumption—which is very questionable in point of law—that he was empowered by the aforesaid proviso [or provisos] in 1 Eliz. c. 2, upon the conference holden before the king himself at Hampton Court, gave directions to the archbishop, and other high commissioners, to review the Common Prayer Book; and they did make several

(*g*) Gibs. p. 268.

(*h*) Ibid.

(*i*) Vide supra, pp. 103, 352.

material alterations and enlargements of it, as in the office of private baptism, and in several rubrics and other passages, and added five or six new prayers and thanksgivings, and all that part of the catechism which contains the doctrine of the sacraments. And yet, it has been observed, the powers specified in that proviso [or those provisoes] seem not to extend to the queen's heirs and successors, but to be only lodged personally in the queen; yet the Book of Common Prayer so altered stood in force from the first year of King James, to the fourteenth of Charles the Second (*k*).

And it is to be observed, Dr. Burn says, that the liturgy of 14 Car. 2, c. 4, is not the same with that which the aforesaid canons do refer to; so that so far forth the said canons as to this matter are not now in force (*l*).

14 Car. 2, c. 4, after reciting the establishment of the Elizabethan prayer book, the refusal of people to come to church, by the neglect of ministers in using the order of Common Prayer, the late troubles, and the great mischiefs and inconveniences which have arisen, proceeds as follows: "For the prevention whereof in time to come . . . for settling the peace of the church, and for allaying the present distempers . . . the king (according to his declaration of the five and twentieth of October, 1660), granted his commission under the great seal of England to several bishops and other divines, to review the Book of Common Prayer, and to prepare such alterations and additions as they thought fit to offer: And afterwards the Convocations of both the provinces of Canterbury and York being by his majesty called and assembled, and now sitting, his Majesty hath been pleased to authorize and require the presidents of the said Convocations, and other the bishops and clergy of the same, to review the said book of common prayer, and the book of the form and manner of the making and consecrating of bishops, priests and deacons; and that after mature consideration, they should make such additions and alterations in the said books respectively, as to them should seem meet and convenient, and should exhibit and present the same to his Majesty in writing, for his further allowance or confirmation since which time . . . they the said presidents, bishops and clergy of both provinces have accordingly reviewed the said books, and have made some alterations which they think fit to be inserted to the same, and some additional prayers to the said book of common prayer to be used upon proper and emergent occasions; and have exhibited and presented the same unto his Majesty in writing in one book, intituled, 'The Book of Common Prayer and administration of the Sacraments, and other rites

Act of Uniformity,
14 Car. 2, c. 4.

(*k*) Wats. c. 31, p. 321. See also the last section (now repealed) of 14 Car. 2, c. 4, which seems to treat the prayer book of Elizabeth, and not that of James, as the legal standard till the new one came into

force.

(*l*) See *vide supra*, p. 719, the decision of the Privy Council in *Hebbert v. Purchas*, L. R., 3 P. C. p. 605.

and ceremonies of the Church, according to the use of the Church of England together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches and the form and manner of making, ordaining and consecrating of bishops, priests and deacons:’ All which his Majesty having duly considered, hath fully approved and allowed the same, and recommended to this present parliament, that the said books of common prayer and of the form of ordination and consecration of bishops, priests and deacons, with the alterations and additions which have been so made and presented to his Majesty by the said Convocations, be the book which shall be appointed to be used by all that officiate in all cathedral and collegiate churches and chapels, and in all chapels of colleges and halls in both the universities and the colleges of Eton and Winchester and in all parish churches and chapels . . . and by all that make or consecrate bishops priests or deacons, in any of the said places, under such sanctions and penalties as the houses of parliament shall think fit.

“ Now in regard that nothing conduceth more to the settling of the peace of the nation, nor to the honour of our religion and the propagation thereof, than an universal agreement in the public worship of Almighty God and to the intent that every person within this realm may certainly know the rule to which he is to conform in public worship and administration of sacraments, and other rites and ceremonies of the Church of England, and the manner how and by whom bishops, priests and deacons, are and ought to be made, ordained and consecrated be it enacted by the King’s most excellent Majesty, by the advice and consent of the lords spiritual and temporal, and of the commons in this present Parliament assembled, and by the authority of the same, that all and singular ministers in any cathedral collegiate or parish church or chapel or other place of public worship, . . . shall be bound to say and use the morning prayer evening prayer celebration and administration of both the sacraments and all other the public and common prayer, in such order and form as is mentioned in the said book, annexed and joined to this present act and intituled” [here the title is repeated]; “and that the morning and evening prayers therein contained shall, upon every Lord’s day and upon all other days and occasions and at the times therein appointed, be openly and solemnly read by all and every minister or curate, in every church chapel or other place of public worship. . . .”

Savoy
Conference.

Granted his Commission under the Great Seal.]—Which bore date March 25th, 1661, and was directed to twelve bishops and twelve presbyterian divines; with nine assistants on each side, to supply the places of the principals, when they should be occasionally absent. In virtue of which commission the commissioners met frequently at the Savoy, and disputations were held, but nothing concluded (*m*).

In such Order and Form as is mentioned in the said Book.]—It is provided by sect. 21, “that in all those prayers litanies and collects, which do any way relate to the King, Queen or royal progeny, the names be altered and changed from time to time and fitted to the present occasion, according to the direction of lawful authority.” That is, (according to practice,) of the king or queen in council (*n*). Alteration
of names of
Sovereign, &c.

By sect. 22, a true printed copy of the Book of Common Prayer, was at the costs and charges of the parishioners of every parish church and chapelry, cathedral church, college and hall to be provided before the feast of St. Bartholomew, 1662; on pain of 3*l*. a month, for so long time as they should be unprovided thereof. 14 Car. 2, c. 4.

By sect. 24, the respective deans and chapters of every cathedral or collegiate church were required, before December 25, 1662, to obtain under the great seal of England, “a true and perfect printed copy of this act, and of the said book annexed hereunto to be by the said deans and chapters and their successors kept and preserved in safety for ever, and to be also produced and showed forth in any court of record as often as they shall be thereunto lawfully required; and also there shall be delivered true and perfect copies of this act and of the same book into the respective courts at Westminster, and into the Tower of London to be kept and preserved for ever among the records of the said courts, and the records of the Tower to be also produced and showed forth in any court as need shall require which said books so to be exemplified under the great seal of England, shall be examined by such persons as the King’s Majesty shall appoint under the great seal of England for that purpose, and shall be compared with the original book hereunto annexed and shall have power to correct and amend in writing any error committed by the printer in printing of the same book or of anything therein contained, and shall certify in writing under their hands and seals or the hands and seals of any three of them at the end of the same book that they have examined and compared the same book and find it to be a true and perfect copy;” which said books so exemplified under the great seal of England as aforesaid, shall be deemed . . . to be good and available in the law to all intents and purposes whatsoever, and shall be accounted as good records as this book itself hereunto annexed. . . . (*o*).

The provisions relating to the public reading of the Thirty-nine Articles, and the declaration of assent thereto and to The Book of Common Prayer by all beneficed ministers and by lecturers, have been already stated (*p*). Other
provisions.

Sect. 5 requires resident incumbents who keep curates, never-

(*n*) Gibs. p. 280.

(*o*) See the Report of the Ritual Commission on the discovery of the

sealed book at Westminster.

(*p*) Vide *supra*, pp. 352, 353.

theless themselves, unless for some lawful impediment to be allowed by the ordinary, to read openly and publicly the common prayer as prescribed, and if need be administer each of the sacraments, under a penalty of 5*l*.

None but
priests to hold
benefices, &c.

The 10th section enacts, "That no person whatsoever shall thenceforth be capable to be admitted to any parsonage vicarage, benefice or other ecclesiastical promotion or dignity whatsoever nor shall presume to consecrate and administer the holy sacrament of the Lord's Supper, before such time as he shall be ordained priest according to the form and manner in and by the said book prescribed, unless he have formerly been made priest by episcopal ordination" under penalty of 100*l*., "and to be disabled from taking or being admitted into the order of priest by the space of one whole year then next following" (*r*).

Foreign
reformed
churches.

Sect. 11. "Provided, that the penalties in this act shall not extend to the foreigners or aliens of the foreign reformed churches, allowed or to be allowed by the king's majesty, his heirs and successors in England."

As to West-
minster, Win-
chester, and
Eton Colleges.

Sect. 13. "And no form or order of common prayers, administration of sacraments rites or ceremonies shall be openly used in any church, chapel or other public place of or in any college or hall in either of the universities the colleges of Westminster, Winchester or Eton or any of them, other than what is prescribed and appointed to be used in and by the said book; . . . and every governor or head of any of the said colleges or halls . . . within one month next after his election or collation and admission into the same government or headship, shall openly and publicly in the church chapel or other public place of the same college or hall, and in the presence of the fellows and scholars of the same or the greater part of them then resident subscribe unto" the Thirty-nine Articles and "the said book, and declare his unfeigned assent and consent unto, and approbation of the said articles and of the same book, and to the use of all the prayers rites and ceremonies, forms and orders therein prescribed and contained according to the form aforesaid." And all such governors or heads . . . as are or shall be in holy orders "shall once . . . at least in every quarter of the year (not having a lawful impediment) openly and publicly read the morning prayer and service in and by the said book appointed to be read in the church chapel or other public place of the same college or hall upon pain to lose and be suspended of and from all the benefits and profits belonging to the same government or headship by the space of six months by the visitor or visitors of the same college or hall." And if such governor or head . . . shall not at or before the end of six months next after such suspension subscribe unto the said articles and book and declare his consent thereunto as aforesaid or

read the morning prayer and service as aforesaid, then such government or headship shall be (*ipso facto*) void."

By 34 & 35 Vict. c. 26, s. 8, this section is repealed, "except so far as it relates to the colleges of Westminster, Winchester and Eton, or any governor or head thereof."

By sect. 6 of the last-mentioned act the morning and evening prayer according to the order of the Book of Common Prayer shall continue to be used daily as heretofore in the chapel of every college subsisting at the time of passing this act in either university; but an abridgment or adaptation of morning and evening prayer may be authorized for use by the visitor in writing at the request of the governing body.

As to the penalties, both by canon and statute, for disobedience to the Statutes of Uniformity: Penalties for disobedience.

By Can. 4 of 1603, "Whosoever shall hereafter affirm, That the form of God's worship in the Church of England, established by law, and contained in the Book of Common Prayer and Administration of Sacraments, is a corrupt, superstitious, or unlawful worship of God, or containeth anything in it that is repugnant to the scriptures; let him be excommunicated *ipso facto*, and not restored but by the bishop of the place, or archbishop, after his repentance and public revocation of such his wicked errors."

Canon 4.

By Can. 38 of 1865, "If any minister after he hath made and subscribed the declaration aforesaid (s) shall omit to use the form of prayer, or any of the orders or ceremonies prescribed in the Communion Book, let him be suspended; and if after a month he do not reform and submit himself, let him be excommunicated; and then if he shall not submit himself within the space of another month, let him be deposed from the ministry."

Canon 38.

And by Can. 98 of 1603, "Forasmuch as they who break the laws cannot in reason claim any benefit or protection by the same; we decree and appoint, That after any judge ecclesiastical hath proceeded judicially against obstinate and factious persons and contemners of ceremonies, for not observing the rites and orders of the Church of England, or for contempt of public prayer, no judge *ad quem*, shall admit or allow any his or their appeals, unless he having first seen the original appeal, the party appelland do first personally promise and avow, that he will faithfully keep and observe all the rites and ceremonies of the Church of England, as also the prescript form of common prayer, and do likewise subscribe to the three articles formerly by us specified and declared."

Canon 98.

By 2 & 3 Edw. 6, c. 1, s. 2, it is enacted as follows: "If any manner of parson, vicar, or other whatsoever minister that ought or should sing or say common prayer mentioned in the said book, or minister the sacraments, . . . refuse to use the 2 & 3 Edw. 6, c. 1.

(s) i.e. by Canon 36 of 1865.

said common prayers, or to minister the sacraments in such cathedral or parish church or other places as he should use to minister the same, in such order and form as they be mentioned and set forth in the said book, or shall wilfully or obstinately, standing in the same, use any other rite ceremony order form or manner of mass, openly or privily, or mattens even-song administration of the sacraments or other open prayer than is mentioned and set forth in the said book (open prayer in and throughout this act is meant that prayer which is for others to come unto or hear, either in common churches or private chapels or oratories, commonly called the service of the church); or shall preach declare or speak anything in the derogation or depraving of the said book or anything therein contained or of any part thereof;" then upon conviction, he shall forfeit to the king for his first offence the profit of such one of his spiritual benefices or promotions as it shall please the king to appoint, coming or arising in one whole year after his conviction, and also be imprisoned for six months; and for his second offence he shall be imprisoned for a year, and be deprived *ipso facto* of all his spiritual promotions, and the patron shall present to the same as if he were dead; and for the third offence shall be imprisoned during life; and if he shall not have any spiritual promotion, he shall for the first offence suffer imprisonment six months, and for the second offence imprisonment during life."

1 Eliz. c. 2.

The words are the same in 1 Eliz. c. 2, s. 2, except that the words "celebrating the Lord's Supper," are substituted for the word "mass." The penalties are rather more severe. The offender shall forfeit to the king for the first offence the profit of all his spiritual promotions for one year, and be imprisoned for six months; for the second offence shall be imprisoned for a year, and deprived *ipso facto* of all his spiritual promotions, and the patron shall present as if he were dead; and for the third offence shall be deprived *ipso facto* of all his spiritual promotions, and be imprisoned during life: and if he have no spiritual promotion, he shall for the first offence be imprisoned for a year, and for the second offence during life.

Depraving,
&c. by lay-
men.

And by sect. 3 of the same act, "If any person . . . shall in any interludes plays songs rhymes or by other open words, declare or speak anything in the derogation, depraving or despising of the same book, or of anything therein contained, or any part thereof, or shall by open fact deed or by open threatenings compel or cause or otherwise procure or maintain any parson vicar or other minister in any cathedral or parish church or chapel or in any other place, to sing or say any common or open prayer, or to minister any sacrament otherwise, or in any other manner and form, than is mentioned in the said book; or that by any of the said means shall unlawfully interrupt or let any parson, vicar or other minister, in any cathedral, or parish church, chapel or other place, to sing or say any common and open prayer, or to minister any sacrament otherwise or

any of them, in such manner and form as is mentioned in the said book ;” every such person, on conviction shall (if the prosecution is on the statute of Edward VI.) forfeit to the king for the first offence 10*l.*, for the second offence 20*l.*, for the third offence shall forfeit all his goods and be imprisoned during life : and if for the first offence he do not pay the 10*l.* within six weeks after his conviction, he shall instead of the said 10*l.* be imprisoned for three months ; and if for the second offence he do not pay the said sum of 20*l.* within six weeks after his conviction, he shall instead of the said 20*l.* be imprisoned for six months. And if the prosecution is on the statute of Elizabeth, he shall forfeit to the king for the first offence 100 marks, for the second offence 400 marks, for the third offence shall forfeit all his goods and be imprisoned during life ; and if he do not pay the sum for the first offence within six weeks next after his conviction, he shall instead thereof be imprisoned for six months ; and if he do not pay the sum for the second offence within six weeks next after his conviction, he shall instead thereof be imprisoned for twelve months.

By the same acts the justices of oyer and determiner, or justices of assize, shall have power to inquire of, hear and determine all offences contrary to the acts, “and to make process for the execution of the same, as they may do against any person being indicted before them of trespass, or lawfully convicted thereof.” Provided that every archbishop and bishop “shall or may at his liberty and pleasure associate himself to the said justices of oyer and determiner or to the said justices of assize . . . for and to the enquiry, hearing and determining of the offences aforesaid.”

But no person shall be molested for any offence against these acts, unless he be indicted thereof at the next assizes.

And lords of parliament for the said offences on 2 & 3 Edw. 6, are to be tried by their peers. But if the prosecution is on 1 Eliz. c. 2, then they shall only for the third offence be tried by their peers.

And all mayors, bailiffs, and other head officers of cities, boroughs, or towns corporate, “to the which justices of assize do not commonly repair,” shall have power to inquire of, hear and determine offences against these acts within fifteen days after the Feast of Easter and St. Michael the Archangel yearly.

By sect. 12 of the stat. of Edward VI., it is provided that “All and singular archbishops and bishops, and every of their chancellors commissaries archdeacons and other ordinaries having any peculiar ecclesiastical jurisdiction shall have power by virtue of this act, as well to inquire in their visitations synods and elsewhere, within their jurisdiction, at any other time and place, to take accusations and informations of all and every the things above mentioned done or committed within the limits of their jurisdiction and authority, and to punish the same by admoni-

2 & 3 Edw. 6,
c. 1, s. 4 ;
1 Eliz. c. 2,
s. 5.

Archbishop
and bishop
may associate
himself with
justice of
assize.

Indictment
to be at next
assizes.

Lords of Par-
liament.

Jurisdiction
in municip-
alities.

Ecclesiastical
jurisdiction
reserved.

Peculiar and
exempt
jurisdictions.

tion excommunication sequestration or deprivation and other censures and process, in like form as heretofore hath been used in like cases by the king's ecclesiastical laws." Sect. 11 of the statute of Elizabeth is almost verbatim the same. This act has also, in sect. 4, a charge to all ordinaries to execute the act. And by the same section, "for their authority in this behalf . . . all and singular the said archbishops, bishops, and all other their officers exercising ecclesiastical jurisdiction as well in places exempt as not exempt within their diocese, shall have full power and authority by this act to reform, correct and punish by censures of the church, all and singular persons which shall offend within any their jurisdictions or dioceses . . . any other law, statute, privilege, liberty or provision heretofore made, had, or suffered to the contrary notwithstanding."

Finally there is a proviso that persons punished by their ordinary shall not be punished by the justices, and *vice versâ* (sect. 13 of Edward VI., sect. 12 of Elizabeth).

What ministers were subject hereto.

If any Parson, Vicar, or other whatsoever Minister.]—Roman Catholic priests, as well as others, were so subject; for in a proceeding hereupon, in the 3 Eliz., brought against a Roman priest for saying mass, it was holden by the whole court, that he was within the purview of the statute of 1 Eliz. c. 2, it appearing clearly by the next clause thereof, that the design of the parliament was to abolish the superstitious service, and to establish the new service in its place (*t*).

In *Read v. The Bishop of Lincoln* (*u*) the Archbishop of Canterbury, and apparently his episcopal assessors, except the Bishop of Salisbury, were of opinion that a bishop celebrating in his cathedral or in a parish church of his diocese was a "minister" within these acts; but no reasons were given for this decision, which is open to many difficulties.

What is "Any other rite?"

Use any other Rite.]—In the 26 & 27 Eliz., Flemming was indicted upon this statute of 1 Eliz. c. 2, and punished; because he had given the sacrament of baptism in other form than is here prescribed (*x*).

In 1 Jac. 2, an indictment for using other prayers, and in other manner, seems to have been judged insufficient, because the prayers used may be upon some extraordinary occasion, and so no crime; and it was said, that the indictment ought to have alleged, that the defendant used other forms and prayers instead of those enjoined, which were neglected by him; for otherwise every person may be indicted that uses prayers before his sermon, other than such which are required by the Book of Common Prayer (*y*).

These words, "use any other rite," have been construed by

(*t*) *Sir Edward Walgrave's case*, Dyer, p. 202 b.

(*u*) 14 P. D. p. 148; Roscoe, Report of Bp. of Lincoln's case.

(*x*) *Flemming's case*, 1 Leon. p. 295.

(*y*) *Rex v. Sparks*, 3 Mod. p. 79.

recent decisions to operate as prohibiting any variation, however trifling, in the performance of divine service from that ordered by the Statutes of Uniformity. The cases on this subject will be set forth in the next section of this chapter—Section 7—“On the Performance of the Divine Service.”

Or other open Prayer.]—By the said acts, open prayer in and throughout the same, meaneth “that prayer which is for others to come unto, or hear either in common churches, or private chapels or oratories, commonly called the Service of the church” (z).

Open prayer.
1 Eliz. c. 2,
s. 2; 2 & 3
Edw. 6, c. 1,
s. 2.

Shall forfeit.]—A clerk was indicted hereupon, for using other prayers, and was fined 100 marks; and it was holden by the whole court to be ill: because they can inflict no other punishment than what is directed by the statute (a).

All Archbishops and Bishops.]—If a minister preach against the Book of Common Prayer, this is a good cause of deprivation by the ecclesiastical law without aid of the said statutes; for he that speaks against the peace and quiet of the church, is not worthy to be a governor of the church. And the statutes being in the affirmative, do not take away the ordinary’s power of depriving for the first offence: on the contrary, there is an express proviso, which reserves to him his power (b).

Ecclesiastical
jurisdiction.

In 33 Eliz., Robert Caudrey, clerk, was deprived of his benefice before the high commissioners, as well for that he had preached against the Book of Common Prayer, as also for that he refused to celebrate divine service according to the said book; which deprivation, though not prescribed by the statutes for the first offence, was declared to be good; because the ecclesiastical judge might lawfully inflict such sentence before the making of these statutes, and is not inhibited (on the contrary his ancient power is reserved) by the same statutes (c).

Caudrey’s case.

At Thetford Lent Assizes, 1795, a clerk was indicted upon these statutes; but the evidence was not that he had left out or added any prayers or altered the form of worship, but that he did not read prayers twice on a Sunday, but alternately one Sunday in the morning, and the next in the evening, and omitted to read them at all on certain saint days. The learned judge who tried the indictment, Mr. Baron Perryn, observed that it was *primæ impressionis*, and being of opinion that the offence complained of was purely of ecclesiastical cognizance, and not the subject of prosecution in the temporal courts, directed the jury to acquit the defendant; which they accordingly did.

As to proceed-
ings before a
Criminal
Court.

In a book called “Practick Part of the office of a justice of the peace” (d) will be found precedents of indictments (1) for

(z) See *Freeland v. Neale*, 1 Roberts. p. 643; 6 N. C. p. 232.

P. C. C. p. 186.

(a) *Rex v. Sparks*, 3 Mod. p. 79.

(c) *Gibs*. p. 268; *Caudrey’s case*,

(b) 2 Roll. Abr. p. 222; *Sanders v. Head*, 2 N. C. p. 355; 4 Moore,

5 Co. p. 1.

(d) Published by George Downs, London, 1684, pp. 51, 64, 173.

omitting words in baptismal service, (2) for saying a private mass and not common prayer, (3) for not wearing a surplice or other ornament (*ornamentum*).

35 & 36 Vict.
c. 35.

By the Act of Uniformity Amendment Act, 1872 (35 & 36 Vict. c. 35), after reciting the act 14 Car. 2, c. 4, the appointment of the Ritual Commission and its report, and that "her Majesty was pleased to authorize the convocations of Canterbury and York to consider the said report of the said Commissioners, and to report to her Majesty thereon, and the said convocations have accordingly made their first reports to her Majesty," it was enacted as follows:—

Use of shortened form of Morning and Evening Prayer.

Sect. 2. "The shortened order for morning prayer or for evening prayer, specified in the schedule to this act, may, on any day except Sunday, Christmas Day, Ash Wednesday, Good Friday, and Ascension Day, be used, if in a cathedral, in addition to, and if in a church in lieu of, the order for morning prayer or for evening prayer respectively prescribed by the book of common prayer."

Special service for special occasions.

Sect. 3. "Upon any special occasion approved by the ordinary, there may be used in any cathedral or church a special form of service approved by the ordinary, so that there be not introduced into such service anything, except anthems or hymns, which does not form part of the Holy Scriptures or book of common prayer."

Additional service on Sundays and holy-days.

Sect. 4. "An additional form of service varying from any form prescribed by the book of common prayer may be used at any hour on any Sunday or holy-day in any cathedral or church in which there are duly read, said, or sung as required by law on such Sunday or holy-day at some other hour or hours the order for morning prayer, the litany, such part of the order for the administration of the Lord's Supper or holy communion as is required to be read on Sundays and holy-days if there be no communion, and the order for evening prayer, so that there be not introduced into such additional service any portion of the order for the administration of the Lord's Supper or holy communion, or anything, except anthems or hymns, which does not form part of the Holy Scriptures or book of common prayer, and so that such form of service and the mode in which it is used is for the time being approved by the ordinary; provided that nothing in this section shall affect the use of any portion of the book of common prayer as otherwise authorized by the Act of Uniformity or this act."

Separation of services.

Sect. 5. "Whereas doubts have arisen as to whether the following forms of service, that is to say, the order for morning prayer, the litany, and the order for the administration of the Lord's Supper or holy communion, may be used as separate services, and it is expedient to remove such doubts: be it therefore enacted and declared that any of such forms of service may be used together or in varying order as separate services, or that the litany may be said after the third collect in the order for

evening prayer, either in lieu of or in addition to the use of the litany in the order for morning prayer, without prejudice nevertheless to any legal powers vested in the ordinary; and any of the said forms of service may be used with or without the preaching of a sermon or lecture, or the reading of a homily."

Sect. 6. "Whereas doubts have arisen as to whether a sermon or lecture may be preached without the common prayers and services appointed by the book of common prayer for the time of day being previously read, and it is expedient to remove such doubts: be it therefore enacted and declared, that a sermon or lecture may be preached without the common prayers or services appointed by the book of common prayer being read before it is preached, so that such sermon or lecture be preceded by any service authorized by this act, or by the bidding prayer, or by a collect taken from the book of common prayer, with or without the Lord's Prayer."

Preaching a sermon without previous service.

By sect. 7, nothing is to affect the provision with respect to the chapels of colleges in the universities of Oxford, Cambridge and Durham, contained in section six of the Universities Tests Act, 1871 (e).

Saving of 34 & 35 Vict. c. 26, s. 6.

"SCHEDULE.

"NOTE.—The Minister using the Shortened Order for Morning Prayer or for Evening Prayer in this Schedule, may, in his discretion, add in its proper place any exhortation, prayer, canticle, hymn, psalm or lesson contained in the Order for Morning Prayer or for Evening Prayer in the Book of Common Prayer and omitted, or authorized to be omitted, from such Shortened Order.

"Each of the twenty-two portions into which the one hundred and nineteenth psalm is divided in the Book of Common Prayer shall be deemed, for the purposes of this Schedule, to be a separate psalm.

SHORTENED FORMS OF SERVICE.

THE SHORTENED ORDER FOR MORNING PRAYER DAILY THROUGHOUT THE YEAR, EXCEPT ON SUNDAY, CHRISTMAS DAY, ASH WEDNESDAY, GOOD FRIDAY, AND ASCENSION DAY.

At the beginning of Morning Prayer the Minister shall read with a loud voice some one or more of these sentences of the Scriptures that follow.

When the wicked man, &c.

A general Confession to be said of the whole Congregation after the Minister, all kneeling.

Almighty and most merciful Father, &c.

(e) Vide *supra*, p. 751.

The Absolution, or Remission of Sins, to be pronounced by the Priest alone, standing ; the people still kneeling.

Almighty God, the Father, &c.

The people shall answer here, and at the end of all other prayers, Amen.

Then the Minister shall kneel, and say the Lord's Prayer with an audible voice ; the people also kneeling, and repeating it with him.

Our Father, which art in heaven, &c.

Then likewise he shall say,

O Lord, open thou our lips,
&c. &c. &c.

Here all standing up, the Priest shall say,

Glory be to the Father, &c.

Then shall follow one or more of the Psalms appointed. And at the end of every Psalm throughout the year ; and likewise at the end of Benedicite, Benedictus, Magnificat, and Nunc dimittis, shall be repeated,

Glory be to the Father, &c.

Then shall be read distinctly, with an audible voice, either the First Lesson taken out of the Old Testament as is appointed in the Calendar, or the Second Lesson taken out of the New Testament, except there be a Proper Lesson assigned for that day, in which case the Proper Lesson shall be read, and if there are two Proper Lessons each shall be read in its proper place ; he that readeth so standing and turning himself as he may best be heard of all such as are present.

Note that before every Lesson the Minister shall say, Here beginneth such a Chapter, or Verse of such a Chapter, of such a Book. And after every Lesson, Here endeth the Lesson, or the First or the Second Lesson.

And after the Lesson, or between the First and Second Lessons, shall be said or sung in English one of the following :

Either the Hymn called, Te Deum laudamus.

We praise thee, O God, &c.

Or this Canticle, Benedicite, omnia opera.

O all ye works of the Lord, &c.

Or the Hymn following (except when that shall happen to be read in the Lesson for the day, or for the Gospel on Saint John Baptist's Day) :

Benedictus. St. Luke, i. 68.

Blessed be the Lord God of Israel, &c.

Or this Psalm :

Jubilate Deo.

O be joyful in the Lord, all ye lands, &c.

Then shall be sung or said the Apostles' Creed by the Minister and the people standing.

I believe in God the Father Almighty, &c.

And after that, the people all devoutly kneeling, the Minister shall pronounce with a loud voice,

The Lord be with you.

Answer. And with thy spirit.

Minister. Let us pray.

Then the Priest shall say,

O Lord, shew thy mercy upon us,

&c. &c. &c.

Then shall follow three Collects. The first of the day, which shall be the same that is appointed at the Communion; the second for peace; the third for grace to live well, and the two last Collects shall never alter, but daily be said at Morning Prayer throughout all the year, as followeth, all kneeling.

The second Collect for Peace.

O God, who art the Author of peace, &c.

The third Collect for Grace.

O Lord, our heavenly Father, &c.

Here may follow an Anthem or Hymn :

Then these two Prayers following :

A Prayer of Saint Chrysostome.

Almighty God, who hast given us grace, &c.

2 Corinthians, xiii.

The grace of our Lord Jesus Christ, &c.

Here endeth the Shortened Order of Morning Prayer.

“THE SHORTENED ORDER FOR EVENING PRAYER DAILY THROUGHOUT THE YEAR, EXCEPT ON SUNDAY, CHRISTMAS DAY, ASH WEDNESDAY, GOOD FRIDAY, AND ASCENSION DAY.

At the beginning of Evening Prayer the Minister shall read with a loud voice some one or more of these sentences of the Scriptures that follow :

When the wicked man, &c.

A general Confession to be said of the whole Congregation after the Minister, all kneeling.

Almighty and most merciful Father, &c.

The Absolution, or Remission of Sins, to be pronounced by the Priest alone, standing; the people still kneeling.

Almighty God, the Father, &c.

Then the Minister shall kneel, and say the Lord's Prayer; the people also kneeling, and repeating it with him.

Our Father, which art in heaven, &c.

Then likewise he shall say,

O Lord, open thou our lips.

Here all standing up, the Priest shall say,

Glory be to the Father, &c.

Then shall be said or sung one or more of the Psalms in order as they be appointed. Then either a Lesson of the Old Testament as is appointed, or a Lesson of the New Testament as it is appointed, except there be a proper Lesson assigned for that day, in which case the Proper Lesson shall be read, and if there are two Proper Lessons each shall be read in its proper place: and after the Lesson, or between the First and Second Lessons, shall be said or sung in English one of the following:

Either Magnificat, or the Song of the Blessed Virgin Mary, in English, as follows:

Magnificat. St. Luke, i.

My soul doth magnify the Lord, &c.

Or this Psalm (except it be on the nineteenth day of the month, when it is read in the ordinary course of the Psalms):

Cantate Domino. Psalm xeviii.

O sing unto the Lord a new song, &c.

Or Nunc dimittis (or the Song of Simeon), as followeth:

Nunc dimittis. St. Luke, ii. 29.

Lord, now lettest thou thy servant, &c.

Or else this Psalm (except it be on the twelfth day of the month):

Deus misereatur. Psalm lxvii.

God be merciful unto us, and bless us, &c.

Then shall be said or sung the Apostles' Creed by the Minister and the people, standing:

I believe in God the Father Almighty, &c.

And after that, the people all devoutly kneeling, the Minister shall pronounce with a loud voice,

The Lord be with you.

Answer. And with thy spirit.

Minister. Let us pray.

Then the Priest shall say,

O Lord, shew thy mercy upon us,

&c. &c. &c.

Then shall follow three Collects. The first of the day; the second for peace; the third for aid against all perils, as hereafter followeth; which two last Collects shall be daily said at Evening Prayer without alteration.

The second Collect at Evening Prayer.

O God, from whom all holy desires, &c.

The third Collect for Aid against all Perils.

Lighten our darkness, &c.

Here may follow an Anthem or Hymn.

A Prayer of Saint Chrysostome.

Almighty God, who hast given us grace, &c.

2 Corinthians, xiii.

The grace of our Lord Jesus Christ, &c.

Here endeth the Shortened Order of Evening Prayer."



SECT. 7.—*Performance of Divine Service.*

The law of the Church of England, as has been said, requires the performance of daily service in the morning and evening. Law as to daily service. In this respect, as in others, there appears to be a discrepancy between the rubric and the canons. There still appears to be good reason for the opinion, notwithstanding the judgment of the Privy Council in *Hebbert v. Purchas* (*f*), that the former overrides the latter authority.

By the preface to the Book of Common Prayer: "All priests and deacons are to say daily the morning and evening prayer, either privately or openly, not being let by sickness, or some other urgent cause."

And the curate that ministreth in every parish church or chapel, being at home, and not being otherwise reasonably hindered, shall say the same in the parish church or chapel where he ministreth, and shall cause a bell to be tolled thereunto, a convenient time before he begin, that the people may come to hear God's word, and to pray with him.

By the rubric before the Common Prayer Book of the 2 Edw. 6, it was ordered thus: "The priest being in the quire, shall begin with a loud voice the Lord's Prayer, called the Paternoster." In what part of the church to be performed.

In the Quire.]—That is, in his own seat there, as the way was all Edward the Sixth's time; and as is still done in some churches: but in the beginning of Queen Elizabeth's reign, reading desks began to be set up in the body of the church, and divine service to be read there, by appointment of the ordinaries, according to the power vested in them by the rubric of the 5 & 6 Edw. 6 (*g*).

Shall begin.]—All that now goes before, viz., the sentences, exhortation, confession, and absolution, were first inserted in the second book of Edward the Sixth.

By the rubric before the present common prayer: "The morning and evening prayer shall be used in the accustomed place of the church, chapel, or chancel: except it shall be otherwise determined by the ordinary of the place."

(*f*) Vide supra, pp. 707, 719.

(*g*) Gibs. p. 297.

In what
language.

It is declared by Art. 24 of the Thirty-nine Articles to be "plainly repugnant to the word of God, and the custom of the Primitive Church, to have public prayer in the church, or to minister the sacraments in a tongue not understood of the people."

By 2 & 3 Edw. 6, c. 1, s. 6, any man that understands Greek, Latin, or Hebrew, "or other strange tongue," may say Mattins and Evensong in "Latin or any such other tongue."

And in the chapels of the universities of Oxford and Cambridge "in their common and open prayer," "mattens, evensong, litany, and all other prayers, the Holy Communion commonly called the Mass excepted," may be used in Greek, Latin, or Hebrew.

By 14 Car. 2, c. 4, s. 14, "the morning and evening prayer and all other prayers and service prescribed in and by the said book," may be used in the Chapels of Colleges and Halls in the two Universities, in the Colleges of Westminster, Winchester and Eton, and in the Convocations of the Clergy, in Latin. Queen Elizabeth issued letters patent authorizing a Latin translation of the Prayer Book (*h*).

By 14 Car. 2, c. 4, s. 23, the Bishops of Hereford, St. David's, Asaph, Bangor and Llandaff, and their successors were to have the Prayer Book translated into Welsh, and wherever in these dioceses Welsh is the common language, service is to be had in the Welsh tongue (*i*).

Canon 14.
Common
prayer to be
used on holi-
days.

By Can. 14 of 1603, "The common prayer shall be said or sung distinctly and reverently upon such days as are appointed to be kept holy by the Book of Common Prayer, and their eves, and at convenient and usual times of those days, and in such places of every church, as the bishop of the diocese or ecclesiastical ordinary of the place shall think meet for the largeness or straitness of the same so as the people may be most edified. All ministers likewise shall observe the orders, rites, and ceremonies prescribed in the Book of Common Prayer, as well in reading the holy Scriptures and saying of prayers, as in administration of the sacraments, without either diminishing in regard of preaching, or in any other respect, or adding any thing in the matter or form thereof."

Canon 15.
Litany on
Wednesdays
and Fridays.

By Can. 15, "The litany shall be said or sung when, and as is set down in the Book of Common Prayer, by the parsons, vicars, ministers or curates, in all cathedral, collegiate and parish churches and chapels, in some convenient place, according to the discretion of the bishop of the diocese, or ecclesiastical ordinary of the place; and that we may speak more particularly

(*h*) See 1 Cardwell, Doc. Ann. p. 280.

(*i*) Provision was made by 5 Eliz. c. 28, for translating the Bible into Welsh. As to the provision of

English services also in Welsh-speaking parts of Wales, vide *supra*, p. 252. As to requiring a knowledge of Welsh of a Welsh incumbent, vide *supra*, p. 325.

upon the Wednesdays and Fridays weekly, though they be not holidays, the minister, at the accustomed hours of service, shall resort to the church and chapel, and warning being given to the people by tolling of a bell, shall say the litany prescribed in the Book of Common Prayer: whereunto we wish every householder dwelling within half a mile of the church, to come, or send one at the least of his household fit to join with the minister at prayers."

It should be observed that in certain cases the bishop has been, independently of his general authority, specially empowered to order the number of the services to be performed, and to apportion the duties of the clergymen.

Statutory power of bishop to order service.

By 58 Geo. 3, c. 45, s. 65, it is enacted as follows:—"In any parish or extra-parochial place in which it shall appear to the bishop . . . that the churches or chapels . . . do not or will not afford sufficient accommodation for the parishioners or inhabitants thereof to attend divine service . . . and in which such bishop shall be of opinion that it is expedient that additional accommodation should be provided for such purpose, and that such purpose would be answered by the celebration on Sundays and on the great festivals of a third or additional divine service, being either the morning or evening service . . . as shall be directed by the bishop of the diocese, with a sermon, in the churches or chapels existing at the time of passing this act, or by the celebration of a third or additional service as aforesaid, with a third sermon, in any church or chapel which may be built or provided, under any of the provisions of this act (*k*), it shall be lawful for such bishop to require the incumbent . . . to nominate to him a proper person to be licensed to serve as a curate in the existing church or chapels for the performance of such additional or third service with a sermon, or, in any church or chapel which may be built or provided as aforesaid for the performance of such additional or third service with a third sermon; and such incumbent shall within six months after such requisition nominate such curate to the bishop to be licensed; and in default of such nomination such bishop is hereby empowered to nominate and license a proper curate for the purpose aforesaid."

58 Geo. 3, c. 45.

Bishop empowered in certain cases to order performance of a third service in a parish.

And to license a curate for this purpose.

The section goes on to empower the bishop to have the pews let at this additional service so as to raise a stipend for the curate, unless a subscription is raised instead.

Sect. 80 of 1 & 2 Vict. c. 106, enacts, "That it shall be lawful for the bishop, in his discretion, to order that there shall be two full services, each of such services, if the bishop shall so direct, to include a sermon or lecture, on every Sunday throughout the year, or any part thereof, in the church or chapel of every or any benefice within his diocese, whatever may be the annual value or the population thereof; and also in the church or chapel

1 & 2 Vict. c. 106.

Bishops may enforce two services on Sundays in certain cases.

(*k*) This is the first Church Building Act.

of every parish or chapelry, where a benefice is composed of two or more parishes or chapelries, in which there shall be a church or chapel, if the annual value of the benefice arising from that parish or chapelry shall amount to 150*l.*, and the population of that parish or chapelry shall amount to 400 persons. . . .”

2 & 3 Vict.
c. 30.

Apportion-
ment of
duties.

Bishop may
direct services
where there
are two
churches.

2 & 3 Vict. c. 30, providing that in benefices where there are more than one spiritual person instituted to the cure of souls, the bishop may apportion the duties, has been already referred to (*l*).

It was judicially decided for the first time in the case of *The Bishop of Winchester v. Rugg*, that it was competent to the bishop to determine in the case of one benefice with two churches, how the two services which the clerk was bound to perform on Sunday should be apportioned between the two churches (*m*).

Proviso for
psalms and
prayers taken
out of the
Bible.

The act of uniformity, 2 & 3 Edw. 6, c. 1, has this proviso in sect. 7, “that it shall be lawful for all men, as well in churches chapels oratories or other places, to use openly any psalms or prayer taken out of the Bible, at any due time, not letting or omitting thereby the service, or any part thereof, mentioned in the said book” (*n*).

Church music.

The rule laid down for church music in England almost one thousand years ago, was, that they should observe a plain and devout melody, according to the custom of the church. And the rule prescribed by Queen Elizabeth in her Injunctions was, that there should be a modest and distinct song, so used in all parts of the common prayers in the church, that the same may be as plainly understood as if it were read without singing. Of the want of which grave, serious and intelligible way, the *Reformatio Legum* had complained before.

Hutchins v.
Denziloe.

In *Hutchins v. Denziloe* (*o*), Lord Stowell said the bishop might exercise a discretion as to ordering the psalms to be sung in parish churches as well as in cathedrals; he observed that, “In the primitive churches, the favourite practice of the Christians to sing hymns in alternate verses, is expressly mentioned by Pliny, in one of his epistles to the Emperor Trajan. The Church of Rome afterwards refined upon this practice;—as it was their policy to make their ministers considerable in the eyes of the common people; and one way of effecting that, was by appointing them sole officers in the public service of the church; and difficult music was introduced, which no one could execute without a regular education of that species. At the Reformation this was one of the grievances complained of by the laity; and it became the distinguishing mark of the reformers to use plain music, in opposition to the complex musical service of the catholics. The Lutheran Church, to which the Church of England has more conformed in discipline, retained a choral service.

(*l*) Vide supra, p. 362.

(*m*) L. R., 2 Adm. & Eccl. p. 247; 2 P. C. p. 223.

(*n*) See now ss. 3, 4 of 35 & 36 Vict. c. 35, supra, p. 756.

(*o*) 1 Consist. pp. 170, 175.

The Calvinistic Churches, of which it has sometimes been harshly said, 'that they think to find religion wherever they do not find the Church of Rome,' have discarded it entirely, with a strong attachment to plain congregational melody,—and that perhaps not always of the most harmonious kind.

"The reformation of the Church of England, which was conducted by authority, as all reformations should be, if possible, and not merely by popular impulse, retained the choral service in cathedrals and collegiate chapels. There are certainly, in modern usage, two services to be distinguished; one the cathedral service, which is performed by persons who are in a certain degree professors of music, in which others can join only by ear; the other, in which the service is performed in a plain way, and in which all the congregation nearly take an equal part. It has been argued, that nothing beyond this ought to be permitted in ordinary parochial service; it being that which general usage at the present day alone permits. But that carries the distinction further than the law will support—for, if inquiries go further back, to periods more nearly approaching the Reformation, there will be found authority sufficient, in point of law and practice, to support the use of more music even in a Parish Church or Chapel."

This same case is important as laying down precisely that the minister has the right of directing all parts of the service, even those which he does not perform himself, as, for instance, those performed by the organist or the choir (*p*). Minister's power.

From this principle a corollary has been deduced that the minister is also responsible for all that he authorizes and even, apparently, that he permits to be done in divine service (*q*). His responsibility.

In *Newbery v. Goodwin*, the suit was "for irregularities in reading the holy scriptures, and for quarrelling, chiding, and brawling in the church." The articles charged the defendant with deliberately leaving out a verse in the lesson and calling attention to his own act, with adding comments upon the application for a faculty, the citation in which he had just read out (as was his duty as the law then was) during service, and for publicly rebuking one who came up to communicate. In admitting these articles, Sir John Nicholl said: "The law directs that a clergyman is not to diminish in any respect or add to the prescribed form of worship; uniformity in this respect is one of the leading and distinguishing principles of the Church of England—nothing is left to the discretion or fancy of the individual." These words have had, perhaps, a stricter application given to them, in the modern ritual cases, than was intended by the learned judge.

Newbery v. Goodwin.

(*p*) See also *Wyndham v. Cole*, 1 P. D. p. 130.

(*q*) *Newbery v. Goodwin*, 1 Phillim. p. 282; *Parnell v. Rough-ton*, L. R., 6 P. C. p. 46; and vide passim all the modern ritual cases.

This principle is statutably enforced in cases arising under the Public Worship Regulation Act, 1874, 37 & 38 Vict. c. 85, s. 8 (1). But see *Read v. Bp. of Lincoln*, (1892) 6 App. Ca. p. 644.

Modern ritual cases.

The modern ritual cases are the following :—*Martin v. Mackonochie* (r), *Flamank v. Simpson* (s), *Sumner v. Wix* (t), *Elphinstone v. Purchas* (u), which became in the Privy Council *Hebbert v. Purchas* (x), *Parnell v. Roughton* (y), *Combe v. Edwards* (z), afterwards *Combe v. De La Bere* (a), *Martin v. Mackonochie* (second suit) (b), *Clifton v. Ridsdale* (c), on appeal, *Ridsdale v. Clifton* (d), *Hudson v. Tooth* (e), *Dean v. Green* (f), and *Read v. The Bishop of Lincoln* (g). In this list are not included those cases as to ornaments or decorations of the church which have been already detailed (h).

Elevation of the Blessed Sacrament.

In *Martin v. Mackonochie* (i), the defendant was charged for that he “elevated the paten in a greater degree than by merely taking the same into his hands as prescribed by the Book of Common Prayer and in a greater degree than is necessary to conform with the requirements of such book,” and for that he had “taken into his hands and elevated the cup during the prayer of consecration aforesaid in a manner contrary to the said statutes and to the said Book of Common Prayer.”

The facts, as proved before Sir Robert Phillimore, were thus stated by him: “The kind of elevation which it is charged that at one time Mr. Mackonochie practised, and as to which witnesses were examined before me, amounts upon the evidence to the following acts, that after the consecration, both of the bread and of the wine, he elevated the paten and the cup respectively for an appreciable time, after which there was a pause before the service was continued; this evidence was taken at the beginning of the cause; but during the progress of the argument, at the desire and with the consent of both counsel, Mr. Mackonochie was examined by me upon the single point, whether, when the elevation was made, his face was or was not towards the people; Mr. Mackonochie said, ‘I do not turn round to the people,’ and I never have done so during any time of the consecration ‘prayer.’”

“This elevation Mr. Mackonochie asserts, and it is not denied, that he discontinued after conference with his diocesan, and upon the other grounds to which I have already referred, before the institution of this suit.”

On this Sir Robert Phillimore concluded :—

“I am very glad that he did so, because in my judgment that kind of elevation was unlawful, and I must and do admonish Mr. Mackonochie not to recur to it.”

(r) L. R., 2 Adm. & Eccl. p. 116;
on appeal, 2 P. C. p. 365.

(s) L. R., 2 Adm. & Eccl. p. 116.

(t) L. R., 3 Adm. & Eccl. p. 58.

(u) Ibid. p. 66.

(x) L. R., 3 P. C. p. 605.

(y) L. R., 6 P. C. p. 46.

(z) 2 P. D. p. 354.

(a) 6 P. D. p. 157.

(b) L. R., 4 Adm. & Eccl. p. 279.

(c) 1 P. D. p. 316.

(d) 2 P. D. p. 276.

(e) Ibid. p. 125.

(f) 8 P. D. p. 79.

(g) 14 P. D. p. 148; 6 App. Ca. p. 644; Roscoe, Report of *Bp. of Lincoln's case*, (1892).

(h) Vide supra, sect. 4.

(i) L. R., 2 Adm. & Eccl. p. 116.

The next charge against Mr. Mackonochie was that he "knelt or prostrated himself before the consecrated elements during the prayer of consecration. As to this charge, Sir Robert Phillimore, having said that the argument was confined to the allegation of improper or excessive kneeling, and that the evidence as to the fact was very far from being clear, proceeded as follows:—

Kneeling
during the
Prayer of
Consecration.

"It is true that the rubric does not give precise directions that the celebrant himself should kneel at the times when it appears that Mr. Mackonochie does kneel; but I am very far from saying that it is not legally competent to him, as well as to the other priests and to the congregation, to adopt this attitude of devotion. It cannot be contended that at some time or other he must not kneel during the celebration, although no direction as to his kneeling at all are given by the rubric. . . .

"Moreover, in my opinion, if Mr. Mackonochie has committed any error in this respect, it is one which should not form the subject of a criminal prosecution, but belongs to the category of those cases which should be referred to the bishop, in order that he may exercise thereupon his discretion according to the rubric to which I have already referred."

The Judicial Committee of the Privy Council, to whom the case was appealed by the promoter, after referring to other rubrics and, lastly, the rubric before the prayer of consecration, which is in these words—"When the Priest, standing before the Table, hath so ordered the bread and wine that he may with the more readiness and decency break the bread before the people, and take the cup into his hands, he shall say the prayer of consecration, as follows," said:—

"Their Lordships entertain no doubt on the construction of this Rubric that the Priest is intended to continue in one posture during the prayer, and not to change from standing to kneeling, or *vice versâ*; and it appears to them equally certain that the Priest is intended to stand and not to kneel. They think that the words 'standing before the table' apply to the whole sentence; and they think this is made more apparent by the consideration that acts are to be done by the Priest before the people as the prayer proceeds (such as taking the Paten and Chalice into his hands, breaking the bread, and laying his hand on the various vessels) which could only be done in the attitude of standing.

"This being, in their Lordships' opinion, the proper construction of the Rubric, it is clear that the Respondent, by the posture or change of posture which he has adopted during the prayer, has violated the Rubric, and committed an offence within the meaning of the 14 Car. 2, c. 4, ss. 2, 17, 24, taken in connection with the 1 Eliz. c. 2, and punishable by admonition under sect. 23 of the latter statute.

"It was contended on behalf of the Respondent that the act complained of was one of those minute details which could not

be taken to be covered by the provisions of the Rubric; that the Rubric could not be considered as exhaustive in its directions, for no order could be shown in it requiring the celebrating minister to kneel while himself receiving the bread and wine; and that there was no charge or evidence against the Respondent that in kneeling after the consecration, any adoration of the sacrament was intended.

"Their Lordships are of opinion that it is not open to a Minister of the Church, or even to their Lordships in advising her Majesty as the highest Ecclesiastical Tribunal of Appeal, to draw a distinction, in acts which are a departure from or violation of the Rubric, between those which are important and those which appear to be trivial. The object of a *Statute of Uniformity* is, as its preamble expresses, to produce 'an universal agreement in the public worship of Almighty God,' an object which would be wholly frustrated if each Minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, to add to, or to alter any of those details. The rule upon this subject has been already laid down by the Judicial Committee in *Westerton v. Liddell (k)*, and their Lordships are disposed entirely to adhere to it: 'In the performance of the 'services, rites, and ceremonies ordered by the Prayer Book, the 'directions contained in it must be strictly observed; no omission 'and no addition can be permitted.'"

As to the view expressed by Sir Robert Phillimore that this was not a criminal matter, their lordships said:

"The learned judge further observes that if Mr. Mackonochie has committed any error in this respect, it is one which should not form the subject of a criminal prosecution, but belongs to the category of cases which should be referred to the Bishop. This category the learned judge had previously defined to be— 'Things neither ordered nor prohibited expressly or by implication, but the doing or use of which must be governed by 'the living discretion of some person in authority.'

"And as to cases in this category, the learned judge considered that, according to the preface to the Prayer Book, 'the 'parties that doubt or diversely take anything should always 'resort to the bishop of the diocese.'

"Their Lordships do not think it necessary to consider minutely the cases to which, or the manner in which, this direction in the preface to the Prayer Book is applicable, inasmuch as in their opinion the charge against the Respondent, with which they are now dealing, involves what is expressly ordered and prohibited by the Rubric, and is therefore a matter in which the Bishop could have no jurisdiction to modify or dispense with the rubrical provisions."

Incense.

The charge against Mr. Mackonochie as to the use of incense was twofold; the first part related to what is technically called

(k) Moore's Special Report.

"censing persons and things," and charged that the defendant had in his church "used incense for censing persons and things in and during the celebration of the holy communion, and permitted and sanctioned such use of incense."

The defendant admitted that he had used incense for censing persons and things in and during the celebration of the holy communion, but alleged that ever since the 30th December, 1866, he had desisted from so doing, and had ever since discontinued the said ceremony.

The other part of the charge related to another use of incense, and alleged that the defendant had in his church "unlawfully used incense in and during the celebration of the holy communion."

To this the defendant answered, that he admits that he had in his church caused and allowed incense to be burnt during the reading of the prayer of consecration, and afterwards until the time for the administration of the communion to the people, and permitted and sanctioned such use of incense; but that he denies that he used the same unlawfully, or that such use is unlawful.

The objection was not taken to the general use of incense for the purposes of ornament or fumigation of the church, for which purposes it appears to have been used at various times since the Reformation.

Sir Robert Phillimore, after referring to the evidence as to use of incense, said:—

"It is not, however, necessarily subsidiary to the celebration of the holy communion, and it is not to be found in the rubrics of the present prayer book, which describe with considerable minuteness every outward act which is to be done at that time.

"To bring in incense at the beginning or during the celebration and remove it at the close of the celebration of the eucharist appears to me a distinct ceremony, additional and not even indirectly incident to the ceremonies ordered by the Book of Common Prayer.

"Although, therefore, it be an ancient, innocent and pleasing custom, I am constrained to pronounce that the use of it by Mr. Mackonochie in the manner specified in both charges is illegal, and must be discontinued."

In the subsequent case of *Sumner v. Wix* (1) the Dean of the Arches said: "Now with respect to the use of incense, the principal defence is that it was employed during an interval between two services, and neither belonged to nor was subsidiary to either. I cannot take this view of the state of facts which is proved by the evidence. I think the fair result of that evidence is that incense was used in the interval between two services which would otherwise have immediately succeeded each other ;

Sumner v. Wix.

(1) L. R., 3 Adm. & Eccl. p. 58.

almost the same congregation was present at both services and in the interval between them. It is true that after the incense had been removed a bell was rung to signify that the second service was about to begin; but looking at all the circumstances I think it would be unreasonable and unjudicial not to conclude that the burning of the incense was intended to be subsidiary and preparatory to the celebration of the holy communion."

This use of incense was, therefore, pronounced to be illegal.

None of these points in ritual have come up for decision in any later case.

Mixed
chalice.

*Martin v.
Mackonochie.*

As to the mixed chalice, the tenth article against Mr. Mackonochie alleged that he had in his church, during the celebration of the holy communion, mixed water with the wine used in the administration of the holy communion, and permitted the mixing and the administration to the communicants of the wine and water so mixed.

The defendant admitted this article to be true.

Sir Robert Phillimore, having adverted to the primitive practice on the subject, said: "In our own church this custom prevailed before the Reformation; and in the first order of the communion which preceded the first prayer book, the rubric directed that the priest should 'bless and consecrate the biggest chalice or some fair and convenient cup or cups full of wine with some water put unto it;' and the rubric to the communion service of the first prayer book directs that the minister shall 'take so much bread and wine as shall suffice for the persons appointed to receive the holy communion' . . . 'and putting the wine into the chalice or else in some fair and convenient cup prepared for that use (if the chalice will not serve), putting thereto a little pure and clean water, and setting both the bread and wine upon the altar.' It is clear, therefore, that under the word 'wine' might be comprehended the wine and water; and in a subsequent rubric at the end of the service the direction is, that the pastors and curates shall find at their costs and charges 'sufficient bread and wine for the holy communion.'

"In all subsequent prayer books the mention of water is omitted; perhaps from the omission in the second Prayer Book no argument unfavourable to the use of water could fairly be drawn, as no manual acts of consecration are prescribed in that book. But in the present Prayer Book the manual acts are advisedly specified with great distinctness and particularity; exact directions are given when the priest shall take into his hands the bread and the wine, when he shall place them on the table, and how he shall administer them; and I must bear in mind that the compilers of our present prayer book had before them the first prayer book of Edward VI., and carefully considered the rubrics which it contained; and in my opinion the legal consequence of this omission, both of the water and of the act of mixing it with the wine, must be considered as a prohibition of the ceremony or manual act of mixing the water with

the wine during the celebration of the eucharist. . . . the mingling a little pure water with the wine is an innocent and primitive custom, and one which has been sanctioned by eminent authorities in our church, and I do not say that it is illegal to administer to the communicants wine in which a little water has been previously mixed; my decision upon this point is, that the mixing may not take place during the service, because such mixing would be a ceremony designedly omitted in and therefore prohibited by the rubrics of the present prayer book."

In the subsequent case of *Elphinstone v. Hebbert v. Purchas* (l), the question of the lawfulness of administering wine mixed with water, though not mixed at the time of celebration, or as a part of the ceremony, was raised. Sir Robert Phillimore, referring among other authorities to Bishop Andrewes and Palmer's *Origines Liturgicæ*, pronounced in favour of the lawfulness of this practice. The Privy Council on appeal reversed this part of the judgment, and declared the practice unlawful.

Elphinstone v. Purchas.

Administration of mixed chalice.

In *Read v. The Bishop of Lincoln* (m), the Archbishop of Canterbury and his assessors adopted the view of Sir Robert Phillimore, and thought that the chalice should not be mixed during the service, but might and probably should be administered mixed.

Read v. The Bishop of Lincoln.

On appeal the Privy Council affirmed the Archbishop's decision, holding that "the use of a cup mixed beforehand does not constitute an ecclesiastical offence" (n).

In the undefended case of *Elphinstone v. Purchas* (o), one of the charges was that Mr. Purchas, "in the administration of the Holy Communion, used wafer bread (being bread made in the special shape and fashion of circular wafers) instead of bread such as is usual to be eaten, and did administer the same to the communicants, that is to say, one such wafer to each of them."

Wafer bread.

Elphinstone v. Purchas.

Sir Robert Phillimore was of opinion that under the present rubric uniformity neither of size nor of material was required, that the sacramental bread might be leavened or unleavened, and he acquitted the defendant on this charge.

On appeal, the Privy Council (having no counsel for the defendant to guide them) took it that it was proved that Mr. Purchas was not using "bread such as is usual to be eaten," that the law allowed only "pure wheat bread," and that the use of wafers was an ecclesiastical offence (p).

But in *Ridsdale v. Clifton* (q), it was pointed out on a similar charge that the word "wafer" applies to form only, not to material, and that averment and proof that wafers are used do not warrant a condemnation for error as to material, that at any rate no uniformity of size is required (as Sir Robert Phillimore had held), and that the charge *per se* was a bad one.

Ridsdale v. Clifton.

(l) L. R., 3 Adm. & Eccl. p. 66; 3 P. C. p. 605.

(m) 1891, P. p. 9; Roscoe, Report of *Bp. of Lincoln's case*.

(n) 1892, App. Ca. p. 644.

(o) L. R., 3 Adm. & Eccl. p. 66.

(p) L. R., 3 P. C. p. 605.

(q) 2 P. D. p. 276.

The Privy Council took this view, and dismissed this charge against Mr. Ridsdale.

And here this question has since rested.

Lights on the
Holy Table.

As to lights on the holy table, one of the articles against Mr. Mackonochie alleged that the defendant had in his church "used lighted candles on the communion table during the celebration of the holy communion, at times when such lighted candles were not wanted for the purpose of giving light."

*Martin v.
Mackonochie.*

The answer to this article alleged that the said lighted candles were not placed upon the communion table, but upon a narrow moveable ledge of wood, resting on the said table, and that the said candles were so placed and kept lighted, not during the celebration of the holy communion only, but also during the whole of the reading of the communion service, including the epistle and gospel, and during the singing after the reading of the Nicene Creed, and during the delivery of the sermon.

Sir Robert Phillimore made among other observations the following:—"There is no express direction in the rubrics, or in the Statutes of Uniformity, or in the Canons of 1603, for the use of lights at all on the holy table. Nor is there in these documents any express prohibition of this ornament of divine service; and, adhering to the principle which has guided my judgment in the matters of the elevation, the mixing of water with wine, and of the incense, it becomes my duty to consider whether the use of lights on the holy table falls under the category of things indirectly, or by necessary implication, prohibited upon the grounds which have been stated, or whether it be lawful either as indirectly ordered or innocently subsidiary to divine worship. But there is also another consideration peculiar to this subject, and which must in some degree distinguish the treatment of this ornament from that which the others have received, namely, the important consideration whether the use of lights has not been ordered by competent authority, and whether that order must not, upon legal principles of construction, be deemed a part of the present law of the Church."

He then referred to the rubric as to the ornaments of the church, and to the royal Injunctions of 1547. The material Injunction is as follows:—

"That suche images as thei knowe in any of their cures, to bee, or have been so abused with pilgrimage or offrynges, of any thyng made thereunto, or shal bee hereafter censd unto, thei (and none other private persones) shall for the advoyding of that moste detestable offence of idolotrie, furthewith take downe or cause to bee taken downe, and destroye the same, and shall suffre from hensefurthe, no torches, nor candelles, tapers, or images of ware, to bee sette afore any image or picture, but onely twoo lights upon the high aluter, before the sacrament, whiche, for the significacion, that Christe is the very true light of the worlde, thei shall suffre to remain still: admonishyng their parishioners that images serve for no other purpose, but to bee a remembrance, whereby, man maie bee

admonished of the holy lifes and conversacion of them that the said images doo represent; whiche images, if they doo abuse for any other intent, they commit idolotrie in the same, to greate daunger of their soules."

Sir R. Phillimore came to the conclusion that this Injunction was in force, and said:—

"Inasmuch, therefore, as I think that the injunctions which order these two lights were issued under statutable authority and have not been directly repealed by the like authority; inasmuch as they are not emblematical of any rite or ceremony rejected by our church at the time of the Reformation, inasmuch as they are primitive and catholic in their origin, evangelical in their proper symbolism, purged from all superstition and novelty by the very terms of the injunction which ordered their retention in the church, I am of opinion that it is lawful to place two lighted candles on the holy table during the time of the holy communion 'for the signification that Christ is the very true 'light of the world.'"

On appeal to the Privy Council, however, their lordships said: "The learned judge of the Arches Court was of opinion that these lights were ordered by injunctions having statutable authority, which injunctions had not been directly repealed; that they were primitive and catholic in their origin, evangelical in their proper symbolism, purged from all superstition and novelty by the very terms of the injunction which ordered their retention in the Church, and that, therefore, it was lawful to place them on the Holy Table during the time of the Holy Communion 'for the signification that Christ is the very true light 'of the world.'"

"The authorities cited show beyond all doubt the very ancient and general use in the Church of these symbolical lights; and the injunction to which the learned judge refers, is the third of those issued, A.D. 1547, in the first year of the reign of King Edward VI. By this it was ordered that images should be taken down and destroyed, and that spiritual persons should suffer no torches or candles to be set afore any image or picture, but only two lights upon the High Altar, before the Sacrament, which, for the signification that Christ is the very true light of the world, they should suffer to remain.

"It would deserve consideration how far under any circumstances this injunction could now be held operative, having regard to the words 'upon the High Altar, before the Sacrament,' and to the distinction pointed out by this committee in *Westerton v. Liddell* (r), and *Parker v. Leach* (s), between the Sacrificial Altar and the Communion Table. But without dwelling on this, and without stopping at this place to inquire into the nature of the authority under which the injunctions of 1547 were issued, their lordships are clearly of opinion that the injunction in

(r) Moore's Special Report, pp. 176—184.

(s) 2 Moore, P. C. C., N. S. p. 199.

question, so far as it could be taken to authorize the use of lights as a ceremony or ceremonial act, was abrogated or repealed by the act 1 Eliz. c. 2, particularly by section 27 already mentioned, and by the present Prayer Book and Act of Uniformity, and that the use of lighted candles, viewed as a ceremony or ceremonial act, can derive no warrant from that injunction. . . .

"It remains to be considered whether the use of these two lighted candles can be justified as a question of 'Ornaments' according to the definition of that term already referred to. It was in this sense that the argument for the Respondent appeared to prefer to regard them; and the learned Judge of the Arches Court also, although, at the earlier part of his judgment, he had stated that the matters complained of before him must be considered as 'ceremonies,' appears ultimately to have applied to the use of the lighted Candles the law or rubric as to ornaments."

Their lordships, however, determined that the lights were clearly not "ornaments" within the meaning of the rubric, and that they were not necessarily subsidiary to the service. And on the whole they came to this conclusion: "Their Lordships will, therefore, humbly advise her Majesty that the charge as to lights also has been sustained, and that the respondent should be admonished for the future to abstain from the use of them as pleaded in these articles."

In the case of *Summer v. Wix* (t) it appeared that on the retable, which was a separate and distinct piece of furniture from the holy table, placed behind it, stood two large candles and twelve branch candles, and that on each side of the holy table there stood a large candlestick which rested on the ground. All these candles were lighted after mattins and put out after the communion service was over.

Sir Robert Phillimore said on this:—

"It has been forcibly contended that the two judgments of *Martin v. Mackonochie* and *Liddell v. Westerton* are irreconcilable in principle, and that I ought to follow the doctrine laid down in the former, and not in the latter case. If, indeed, the duty were cast on me of demonstrating that the two decisions were in every respect harmonious as to the principle on which they proceeded, I might perhaps, though I do not say that I should, find the task a difficult one to execute, more especially with respect to the weight apparently given to the injunctions of Edw. VI. in *Liddell v. Westerton*, and their entire rejection in *Martin v. Mackonochie*, when they were relied upon for the purpose of showing that the burning of two candles to represent the true light of the world was illegal. But I am happy to think that no such duty is imposed upon me in the present case. The lights which were burnt in this case were not upon the holy table or 'high altar,' and therefore are unaffected by the injunc-

Lights near
the Holy
Table.
Summer v.
Wix.

tions; and the lighting and the burning of them in the manner and the circumstances proved appears to me to fall under the category of ceremonies. Nor are they, in the language of the privy council in *Martin v. Mackonochie* (u), 'inert and unused,' but things actively employed as a part of a ceremony, and are therefore illegal according to my own decision in the same case. It is not necessary that I should pass any opinion upon the legality of these things, if they were decorations, and neither 'ornaments,' nor ceremonies. It will be remembered that the candles were lit and burning during the whole of the communion service."

The defendant was admonished to abstain from all these practices and condemned in the costs of the suit.

In *Read v. The Bp. of Lincoln* (x) the question of the two lights again arose. The archbishop and his assessors re-considered the matter and came to the conclusion, as Sir Robert Phillimore had done, that the two lights "standing on the Holy Table continuously through the service" were lawful ornaments or decorations.

Read v. The Bishop of Lincoln.

On appeal the Privy Council did not decide this question, holding that as there was no evidence of the ceremonial use of the lights, or of their introduction by the bishop, he could not be condemned for an ecclesiastical offence because he had celebrated without making objection to their presence (x).

In *Elphinstone v. Purchas* (y), one of the articles charged Mr. Purchas that he "used lighted candles standing on and about and before the communion table during the performance of other parts of the morning service than the communion service, as a matter of ceremony, and when they were not wanted for the purpose of giving light;" and continued as follows: "That you also during the whole of divine service on Easter Sunday, 1869, kept a very large lighted candle, called a paschal taper, placed and standing towards the south side of the communion table, as a matter of ceremony, and when it was not wanted for the purpose of giving light. That you also, at various times, during the performance of divine service . . . caused acolytes, or attendants, as a matter of ceremony, to bear about, move, set down, and lift up various lighted candles when the same were not needed to give light."

Elphinstone v. Purchas.
Lights and paschal taper.

These practices were condemned by the Court of Arches.

Many charges as to processions, actions at certain times of the service, and gestures, were brought forward against Mr. Purchas and generally decided against him by the Court of Arches. It is to be borne in mind, however, that the case of Mr. Purchas was undefended, and also that no evidence was offered on his behalf explanatory of the practices for which he was articulated, and also that in each case he was charged with doing the act complained of either "as connected with and being the beginning of and a part of the rites and ceremonies of public worship," or as "a matter of ceremony" (z).

Processions.
Elphinstone v. Purchas.

(u) L. R., 2 P. C. p. 387.
(v) 1891, P. p. 9; Roscoe, Report of *Bp. of Lincoln's case*.

(x) 1892, App. Ca. p. 644.
(y) L. R., 3 Adm. & Eccl. p. 66.
(z) Ibid.

*Martin v.
Mackonochie*
(2nd suit).

In *Martin v. Mackonochie* (2nd suit) (a) a procession of a very special kind was condemned.

*Agnus Dei.
Elphinstone v.
Purchas.*

Another charge against Mr. Purchas was that he "caused to be said or sung, before the reception of the elements, and immediately after the prayer of consecration in the communion service, the words or hymn or prayer commonly known as 'The Agnus,' that is to say:—'O Lamb of God, that takest away the sins of the world, have mercy on us;' which said words are appointed to be said only as a part of the said hymn or prayer at the conclusion of the said service, namely, after the reception of the elements by the communicants is completely ended, and after the Lord's Prayer and the other prayer then appointed and the Gloria have been said, and immediately before the final blessing."

Sir Robert Phillimore thought that this singing must be considered as an additional ceremony within the decision of the Privy Council in *Martin v. Mackonochie* (b), and therefore must be deemed unlawful.

*Martin v.
Mackonochie*
(2nd suit).

In *Martin v. Mackonochie* (2nd suit) (c), he adhered to this decision.

*Read v. Bp. of
Lincoln.*

However, in *Read v. The Bishop of Lincoln* (d), this question was argued more thoroughly than it had been previously; and the archbishop and his assessors came to the conclusion that the Agnus was a lawful hymn at a lawful time.

On appeal the Privy Council affirmed this decision (e).

*Crossing.
Elphinstone v.
Purchas.*

Art. 31 of the articles exhibited in *Elphinstone v. Purchas* (f) charged Mr. Purchas, that he, on divers occasions "during the saying of the Apostles' creed and Nicene creed, and at the pronouncing of the absolution in the order for the holy communion, and at the giving of the elements to the communicants, and on certain other occasions . . . during the pronouncing of the benediction, after the sermon, and on certain other occasions . . . when about to mix water with the wine, and when about to consecrate the same, you being then the officiating minister, made the sign of the cross by the appropriate gesture for that purpose, the same being intended as and constituting a ceremony."

*Kissing the
book of the
gospel.
Elphinstone v.
Purchas.*

Art. 32 charged that Mr. Purchas, "during the communion service, directed, caused, or permitted and sanctioned, a certain clergyman then assisting you in the performance of divine service by reading the gospel for the day, to kiss the book from which he read the gospel, such kissing of the book being intended as and constituting a matter of ceremony, the said book, during such reading of the gospel, being, in a ceremonial manner, held before him by a deacon or attendant."

On these charges, and a third one of elevating the chalice during the prayer for the Church Militant "as a ceremony," Sir Robert Phillimore said:—

(a) L. R., 4 Adm. & Eccl. p. 279.

(b) L. R., 2 P. C. p. 365.

(c) L. R., 4 Adm. & Eccl. p. 279.

(d) 1891, P. p. 9; Roscoe, Report of Bp. of Lincoln's case.

(e) 1892, App. Ca. p. 644.

(f) L. R., 3 Adm. & Eccl. p. 66.

"The ruling of the Privy Council in the case of *Martin v. Mackonochie*, with respect to the kneeling of the priest during the communion service, seems to me to apply to the acts of devotion complained of in these articles, which I must therefore pronounce illegal."

In *Martin v. Mackonochie* (2nd suit) (g), Sir Robert Phillimore followed, on the two former of these points, his judgment in *Elphinstone v. Purchas*. But he held that the defendant might cross himself as a matter of his own private devotion.

Martin v. Mackonochie
(2nd suit).

In *Read v. The Bishop of Lincoln* (h), one of the charges was the making of the sign of the cross on two occasions in the service, that is to say, while pronouncing the Absolution and while giving the Blessing. The archbishop and his assessors said that there was no warrant in ancient practice for making the sign of the cross on these two occasions, and that it was wrong to do so.

Read v. Bishop of Lincoln.

Another of the charges against Mr. Purchas was contained in the following words:—

"And that you also, during the whole of such prayer of consecration, stood at the middle of that side of the holy table which, if the said holy table stood at the east end of the said church or chapel (the said table in St. James's Chapel, in fact, standing at the west end thereof), would be the west side of such table, in such wise that you then stood between the people and the said holy table, with your back to the people, so that the people could not see you break the bread or take the cup into your hand."

Standing
before the
Holy Table.
Elphinstone v. Purchas.

Sir Robert Phillimore said:—

"I must observe that the rubric does not require that the people should see the breaking of the bread or the taking of the cup into the priest's hands; and, if it did so prescribe, the evidence in this case would establish that all the congregation could see him take the cup into his hands, and some of them, at least, could see him break the bread. But in truth the question appears to me to have been settled by the Privy Council in the case of *Martin v. Mackonochie*." [The judge then cited the passage from the judgment in *Martin v. Mackonochie* (i).]

"I dismiss this charge against Mr. Purchas."

The Privy Council, however—at a time when, it is to be observed, the noble lord who delivered the judgment in Mr. Mackonochie's case was not present—overruled this judgment of the Dean of the Arches, and dealt with the language of the Privy Council in the former case as follows:—

Hebbert v. Purchas.

"The learned Judge in the Court below, in considering the charge against the Respondent that he stood with his back to the People during the Prayer of Consecration, briefly observes, 'the question appears to me to have been settled by the Privy

(g) L. R., 4 Adm. & Eccl. p. 279.

(h) 1891, P. p. 9; Roscoe, Report of *Bp. of Lincoln's case*.

(i) Page 767, *supra*.

Council in the case of *Martin v. Mackonochie*.' The question before their Lordships in the case was as to the posture and not as to the position of the minister. The words of the judgment are: [Their lordships then cited the passage from the judgment in *Martin v. Mackonochie* (h).]

"This passage refers to posture or attitude from beginning to end, and not to position with reference to the sides of the Table. And it could not be construed to justify Mr. Purchas in standing with his back to the people, unless a material addition were made to it. The learned Judge reads it as if it ran, 'They think that the words standing before the table apply to the whole sentence, and that before the table means between the table and the people on the west side.' But these last words are mere assumption. The question of position was not before their Lordships; if it had been, no doubt the passage would have been conceived differently, and the question of position expressly settled."

Ridsdale v.
Clifton.

In *Ridsdale v. Clifton* (i), in the Privy Council, the charge was that the respondent "unlawfully stood while saying the prayer of consecration . . . at the middle of the west side of the communion table (such communion table then standing against the east wall, with the shorter sides towards the north and south) in such wise that during the whole time of his saying the said prayer he was between the people and the communion table with his back to the people, so that the people could not see him break the bread or take the cup in his hand." The Privy Council said the minister might, during the prayer of consecration, stand while ordering the elements either facing south or east, and that after this point there was "no specific direction" where he ought to stand during this prayer. They added: "He must, in the opinion of their lordships, stand so that he may in good faith enable the communicants present, or the bulk of them, being properly placed to see, if they wish it, the breaking of the bread and the performance of the other manual acts mentioned. He must not interpose his body so as intentionally to defeat the object of the rubric and to prevent this result." This conclusion was arrived at by construing the words "before the people" as meaning "in the sight of the people," a construction very questionable in scholarship and very devoid of historical support; and by them extending the implied direction to break the bread before the people to the other manual acts, so as to require all to be done in the sight of the people—an extension which is not grammatical. Applying these principles to the case before them, they found that there was not sufficient evidence that Mr. Ridsdale had so acted as to offend, and they dismissed the charge against him.

The result is that the priest may well and lawfully stand at the west side facing east during the whole prayer of consecration, and that a charge that he does so is, *per se*, no charge of an

(h) Page 767, *supra*.

(i) 2 P. D. p. 276.

ecclesiastical offence; but that, if it be further proved that he *intentionally* interposed his body to prevent the people seeing the manual acts, he would be guilty of an offence.

What amounts to intention, and whether, if without intention he prevents sight, he be guilty of an offence, are questions left open by this decision.

In *Read v. The Bp. of Lincoln* (j) a charge was preferred substantially in the same terms as in *Ridsdale v. Clifton*, except that the charge contained a further allegation, to meet the requirements of the Privy Council, that the communicants "were conveniently placed for receiving the Holy Sacrament."

Read v. Bp. of Lincoln.

The archbishop and his assessors thought "that the order of the Holy Communion requires that the manual acts should be visible," and that the minister ought not merely not to wish or intend to hide the manual acts, but ought positively to wish and intend to make them visible to communicants properly placed.

The 18th Article against Mr. Purchas in the Court of Arches charged as follows:—

"That you, the said Rev. John Purchas on a certain occasion . . . directed, sanctioned, or permitted a certain other clergyman, then officiating for you, in the presence of you, the said Rev. John Purchas, to read the collects next before the epistle for the day in the communion service, standing in front of the middle of the holy table, with his back to the people; and that on a certain other occasion, . . . you, the said Rev. John Purchas, read such collects yourself, standing with your back to the people."

*North side.
Elphinstone v.
Purchas.*

Sir Robert Phillimore said: "The rubric which governs the position of the minister at this period of the service is the one preceding the Lord's Prayer at the beginning of the communion service:—'And the priest, standing at the north side of the table, shall say the Lord's Prayer with the collect following, the people kneeling;' and, after the interval of the Ten Commandments, the rubric enjoins the priest 'to stand as before.' I am aware that learned persons hold that these words, 'the north side,' mean 'the north side of the table's front,' and possibly they do so; but, in the absence of any argument before me to this effect, I think I must take the *primâ facie* meaning of the rubric, and consider it as the north side of the whole table; and upon this ground I must decide against Mr. Purchas upon this article."

In the same case, the two following positions were also complained of:—

(a) That "you, the said Rev. John Purchas, did, in the said church or chapel, during the performance of divine service, and while reading the collects following the creed, stand in front of the middle of the holy table at the foot of the steps leading up to the same, with your back to the people:"

(j) 1891, P. p. 9; Roscoe, Report of *Bp. of Lincoln's case*.

(b) And that "you, the said Rev. John Purchas, directed, sanctioned or permitted the epistle in the communion service to be read in your presence by a minister standing with his back to the people."

Sir Robert Phillimore said: "The first offence appears to me plainly contrary to the rubric; and the second, though, perhaps, not governed by any positive order in a rubric, is obviously contrary to the intent of the Prayer Book, the epistle not being a prayer addressed to God, but a portion of the Scripture read to the people."

This question of the north side, therefore, did not come before the Privy Council on appeal in *Hebbert v. Purchas* (k). Nor was it raised in *Ridsdale v. Clifton* (l). But in both cases there were plenty of *obiter dicta* to the effect that the north side was the north end, and that the priest beginning the communion service must stand at the north end of the holy table.

Read v. Bp. of Lincoln.

However, in *Read v. The Bishop of Lincoln* (m), the archbishop and his assessors, while agreeing with Sir Robert Phillimore in thinking that the words north side did not mean the north part of the front, said that with the altered position of the holy table there was now, strictly speaking, no north side in the sense intended by the rubric, that there could now be no literal compliance with the rubric, and that it is not an offence to stand against the long west side (which was the old north side) facing east.

And on appeal the Privy Council substantially agreed, holding that it is not an offence "to stand at the northern part of the side which faces westwards" (n).

Ablutions.

A charge of cleansing the chalice and paten at the end of the service in a ceremonial manner, which the pleadings called the "ceremony of ablution" in *Read v. The Bp. of Lincoln*, was thought by the archbishop and his assessors to be ill-founded, the facts showing nothing more than a strict compliance with the rubric, which requires the consumption of any remains of the holy elements. On appeal the Privy Council agreed (o).

Public
Worship
Regulation
Act.

Under the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 8, one of the matters which may be represented is, "That the incumbent has within the preceding twelve months failed to observe or to cause to be observed the directions contained in the Book of Common Prayer relating to the performance in such church or burial ground of the services, rites and ceremonies ordered by the said book, or has made or permitted to be made any unlawful addition to, alteration in, or omission from, such services, rites and ceremonies" (p).

(k) L. R., 3 P. C. p. 605.

(l) 2 P. D. p. 276.

(m) 1891, P. p. 9; Roscoe, Report of *Bp. of Lincoln's case*.

(n) 1892, App. Ca. p. 644.

(o) Ibid.

(p) Vide infra, Part IV., Chap. IX.

SECT. 8.—*Kalendar and Tables of Lessons.*

In the year 1751 a very important alteration was made in the ecclesiastical as well as the civil year, by 24 Geo. 2, c. 23, the preamble of which act is as follows:—"Whereas the legal supputation of the year of our Lord in that part of Great Britain called England, according to which the year beginneth on the 25th day of March, hath been found by experience to be attended with divers inconveniences, not only as it differs from the usage of neighbouring nations, but also from the legal method of computation in that part of Great Britain called Scotland, and from the common usage throughout the whole kingdom, and thereby frequent mistakes are occasioned in the dates of deeds and other writings, and disputes arise therefrom; and whereas the Calendar now in use throughout all his majesty's British dominions, commonly called the *Julian Calendar*, hath been discovered to be erroneous, by mean whereof the vernal or spring equinox, which at the time of the general council of Nice, in the year of our Lord 325, happened on or about the 21st day of March, now happens on the 9th or 10th of the same month; and the said error is still increasing, and if not remedied would in process of time occasion the several equinoxes and solstices to fall at very different times in the civil year from what they formerly did, which might tend to mislead persons ignorant of the said alteration: and whereas a method of correcting the calendar in such manner as that the equinoxes and solstices may for the future fall nearly on the same nominal days on which the same happened at the time of the said general council, hath been received and established, and is now generally practised by almost all other nations of Europe; and whereas it will be of general convenience to merchants and other persons corresponding with other nations and countries, and tend to prevent mistakes and disputes in or concerning the dates of letters and accounts if the like correction be received and established in his majesty's dominions."

24 Geo. 2,
c. 23.

Year to begin
on the 1st day
of January.

Council of
Nice.

Sects. 1 and 2 accordingly provided for beginning the year on the 1st of January instead of the 25th of March, for throwing out eleven days in the year 1752 to make the kalendar right, and for the future arrangements as to leap year.

By sect. 3. "And whereas according to the rule prefixed to the Book of Common Prayer, Easter day is always the first Sunday after the first full moon which happens next after the one and twentieth day of March, and if the full moon happens upon a Sunday, Easter day is the Sunday after; which rule was made in conformity to the decree of the said general council of Nice, for the celebration of the said feast of Easter; And whereas the method of computing the full moons now used in the Church of England, and according to which the table to find Easter for ever prefixed to the said Book of Common Prayer is formed, is by process of time become considerably

Easter and
other
holidays.

erroneous ; And whereas a calendar, and also certain tables and rules for the fixing the true time of the celebration of the said feast of Easter, and the finding the times of the full moons on which the same dependeth, so as the same shall agree as nearly as may be with the decree of the said general council, and also with the practice of foreign countries, have been prepared, and are hereunto annexed ; be it therefore further enacted . . . that the said feast of Easter, or any of the moveable feasts thereon depending, shall from and after the said second day of September be no longer kept or observed . . . according to the said method now used, or the said table prefixed to the said Book of Common Prayer ; and that the said table, and also the column or golden numbers, as they are now prefixed to the respective days of the month in the said calendar, shall be left out in all future editions of the said Book of Common Prayer ; and that the said new calendar, tables, and rules hereunto annexed, shall be prefixed to all such future editions of the said book in the room and stead thereof ; and that from and after the said second day of September all and every the fixed feast-days, holydays and fast-days which are now kept and observed by the Church of England, and also the several solemn days of thanksgiving, and of fasting and humiliation, which, by virtue of any act of parliament now in being, are to be kept and observed, shall be kept and observed on the respective days marked for the celebration of the same in the said new calendar, that is to say, on the same respective nominal days on which the same are now kept and observed, but which, according to the alteration by this act intended to be made as aforesaid, will happen eleven days sooner than the same now do ; and that the said feast of Easter and all other moveable feasts thereon depending, shall from time to time be observed and celebrated according to the said new calendar, tables and rules hereunto annexed, in that part of Great Britain called England, and in all the dominions and countries aforesaid wherein the liturgy of the Church of England now is, or hereafter shall be used ; and that the two moveable terms of Easter and Trinity, and all courts of what nature or kind soever, and all meetings and assemblies of any bodies politic or corporate, and all markets, fairs, and marts, and courts thereunto belonging, which by any law, statute, charter, custom, or usage, are appointed, used, or accustomed to be holden and kept at any moveable time or times depending upon the time of Easter, or any other such moveable feast as aforesaid, shall . . . be holden and kept on such days and times whereon the same shall respectively happen or fall, according to the falling or happening of the said feast of Easter or such other moveable feasts as aforesaid, to be computed according to the said new calendar, tables and rules."

Old lec-
tionary.

Annexed to this act is the calendar with the rules for finding Easter, and the table of lessons then in use.

This table of lessons remained unaltered till the passing of the

act here following; and might still be used in lieu of the new table till January 1, 1879.

In the year 1871 was passed the act 34 & 35 Vict. c. 37, the Prayer Book (Tables of Lessons) Act, 1871, which recites as follows:—"Whereas Commissioners were appointed by her Majesty to inquire and consider (amongst other matters) the Proper Lessons appointed to be read in Morning and Evening Prayer on the Sundays and Holy-days throughout the year, and the Table of First and Second Lessons contained in the calendar in the Book of Common Prayer according to the use of the United Church of England and Ireland, with a view of suggesting and reporting whether any and what alterations and amendments might be advantageously made in the selection of Lessons to be read at the time of divine service :

34 & 35 Vict.
c. 37.

Statute
amending
Tables of
Lessons and
Psalter.

Preamble.

"And whereas the said Commissioners have made a report recommending that the revised Tables of Lessons proper to be read on Sundays and Holy-days, and the revised Table of daily First and Second Lessons set out in the schedule to that report and in the schedule to this act, should be adopted in lieu of the Table of Proper Lessons to be read at Morning and Evening Prayer on the Sundays and other Holy-days throughout the year, and the Table of daily First and Second Lessons in the Calendar prefixed to the said Book of Common Prayer :

"And whereas it is expedient to authorize the use of the said revised Tables of Lessons, and to make such consequential alterations as may be necessary in the directions contained in the said Book of Common Prayer respecting 'the order how the rest of 'Holy Scripture is appointed to be read: '" and proceeded to enact as follows:—

Sect. 2. "After the first day of January, one thousand eight hundred and seventy-two, the directions respecting 'the order 'how the rest of Holy Scripture is appointed to be read,' the Table of Proper Lessons, and the Table of daily first and second lessons contained in the Second Part of the Schedule to this act shall be substituted for the following parts of the Book of Common Prayer of the Church of England respectively; that is to say,—

Substitution
of Tables of
Lessons in
schedule for
old tables.

- (1.) "The said directions for the directions respecting 'the 'order how the rest of Holy Scripture is appointed 'to be read,' set out in the First Part of the said Schedule;
- (2.) "The said Table of Proper Lessons for the Table of 'Proper Lessons to be read at Morning and Evening 'Prayer on the Sundays and other Holy-days through-'out the Year;'
- (3.) "The said Table of daily First and Second lessons for the corresponding portion of the Table of daily First and Second Lessons contained in the 'Calendar with the 'Table of Lessons:'

And all acts relating to the Book of Common Prayer of the

Old tables
may be used
until 1st Jan.
1879.

Proviso
respecting
power to alter
appointed
psalms and
lessons.

Church of England shall be construed to refer to such book as altered by this act, and after the first day of October, one thousand eight hundred and seventy-one, the directions and Tables of Lessons contained in the Second Part of the Schedule to this act shall be printed and published in all editions of the said Book of Common Prayer and (so far as necessary) of the said acts in lieu of the directions and Tables of Lessons for which they are by this act substituted: provided that the Table of Lessons hitherto in legal use may at any time prior to the first of January, one thousand eight hundred and seventy-nine, be followed in lieu of the table hereby substituted therefor; and provided that the occasions whereon power to alter the appointed Psalms and Lessons is, by the Schedule to this act, committed to the Ordinary, shall be all occasions whereon the Ordinary shall judge that such alteration will conduce to edification."

" SCHEDULE.

" FIRST PART.

" Existing Directions prefixed to the Prayer Book to be omitted in future.

" THE ORDER HOW THE REST OF HOLY SCRIPTURE IS APPOINTED TO BE READ.

" The Old Testament is appointed for the first lessons at morning and evening prayer, so as the most part thereof will be read every year once, as in the calendar is appointed.

" The New Testament is appointed for the second lessons at morning and evening prayer, and shall be read over orderly every year thrice, besides the epistles and gospels, except the Apocalypse, out of which there are only certain proper lessons appointed upon divers feasts.

" And to know what lessons shall be read every day, look for the day of the month in the calendar following, and there ye shall find the chapters that shall be read for the lessons, both at morning and evening prayer, except only the moveable feasts, which are not in the calendar, and the immoveable, where there is a blank left in the column of lessons, the proper lessons for all which days are to be found in the table of proper lessons.

" And note that whensoever proper psalms or lessons are appointed, then the psalms and lessons of ordinary course appointed in the psalter and calendar (if they be different) shall be omitted for that time.

" Note also that the collect, epistle, and gospel appointed for the Sunday shall serve all the week after where it is not in this book otherwise ordered.

"SECOND PART.

*"Directions to be prefixed to the Prayer Book in lieu of the
Directions in the First Part of this Schedule.*

"THE ORDER HOW THE REST OF HOLY SCRIPTURE IS APPOINTED
TO BE READ.

"The Old Testament is appointed for the first lessons at morning and evening prayer, so as the most part thereof will be read every year once, as in the calendar is appointed.

"The New Testament is appointed for the second lessons at morning and evening prayer, and shall be read over orderly every year twice, once in the morning and once in the evening, besides the epistles and gospels, except the Apocalypse, out of which there are only certain lessons appointed at the end of the year, and certain proper lessons appointed upon divers feasts.

"And to know what lessons shall be read every day, look for the day of the month in the calendar following, and there ye shall find the chapters and portions of chapters that shall be read for the lessons, both at morning and evening prayer, except only the moveable feasts, which are not in the calendar, and the immoveable, where there is a blank left in the column of lessons, the proper lessons for all which days are to be found in the table of proper lessons.

"If evening prayer is said at two different times in the same place of worship on any Sunday (except a Sunday for which alternative second lessons are specially appointed in the table), the second lesson at the second time may, at the discretion of the minister, be any chapter from the four gospels, or any lesson appointed in the table of lessons from the four gospels.

"Upon occasions, to be approved by the ordinary, other lessons may, with his consent, be substituted for those which are appointed in the calendar.

"And note that whensoever proper psalms or lessons are appointed, then the psalms and lessons of ordinary course appointed in the psalter and calendar (if they be different) shall be omitted for that time.

"Note also that upon occasions to be appointed by the ordinary, other psalms may, with his consent, be substituted for those appointed in the psalter.

"If any of the holy-days for which proper lessons are appointed in the table fall upon a Sunday which is the first Sunday in Advent, Easter Day, Whit-Sunday, or Trinity Sunday, the lessons appointed for such Sunday shall be read, but if it fall upon any other Sunday, the lessons appointed either for the Sunday or for the holy-day may be read at the discretion of the minister.

"Note also that the collect, epistle, and gospel appointed for the Sunday shall serve all the week after, where it is not in this book otherwise ordered."

Then follow the Tables of Lessons now printed in all Prayer Books.

SECT. 9.—*Public Preaching.*

Restraints in the times of Elizabeth and James I.

The clergy in Queen Elizabeth's time being very ignorant (and no wonder, their stipends in most places being exceedingly small), and moreover the state having a jealous eye upon them, as if they were not very well affected to the Reformation, none were permitted to preach without licence, but they were to study and read the homilies gravely and aptly; and they that were instituted subscribed a promise to the same effect. And this continued in some measure in the next reign; for ministers not licensed to preach were by the canons prohibited to expound any text of Scripture, and were only to read the homilies even in their own cures. But the occasion of those canons being now taken away, the bishops do generally and justly forbear to put the canons as to this matter in execution; and every priest is permitted to preach, at least in his own cure, as he may and ought to do by the old canon law, and by the charge given him at his ordination, and by the very nature of his office (*o*).

The restraints on preaching by unbeneficed and unlicensed clergy are as follows:—

General restraints on preaching.

Arundel. "No priest not being licensed shall exercise the office of preaching, until he shall be examined and sent by the bishop, and shall produce the authority by which he preacheth" (*p*).

Rubrics.

Form of ordaining Deacons.—"Take thou authority to read the gospel in the church of God, and to preach the same, if thou be thereto licensed by the bishop himself."

Form of ordaining Priests.—"Take thou authority to preach the word of God, and to minister the holy sacraments, in the congregation, where thou shalt be lawfully appointed thereunto."

Article 23.

By Art. 23 of the Thirty-nine Articles, "It is not lawful for any man to take upon him the office of public preaching, or ministering the sacraments in the congregation, before he be lawfully called and sent to execute the same. And those we ought to judge lawfully called and sent, which be chosen and called to this work by men who have public authority given unto them in the congregation, to call and send ministers into the Lord's vineyard."

Canon 36.

The restrictions on licences to preach, formerly contained in Canon 36 of 1603, and now in the new Canon of 1865, have been already mentioned (*q*).

Canon 49.

Can. 49. "No person whatever not examined and approved by the bishop of the diocese or not licensed as is aforesaid for a

(*o*) Johns. pp. 53, 54. It has been for a long time considered that possession of a benefice renders a

licence to preach unnecessary.

(*p*) Lind. p. 288.

(*q*) Vide supra, pp. 249, 352.

sufficient or convenient preacher, shall take upon him to expound in his own cure or elsewhere any scripture or matter of doctrine; but shall only study to read plainly and aptly (without glossing or adding) the homilies set forth or hereafter to be published by lawful authority for the confirmation of the true faith and for the good instruction and edification of the people."

Can. 50. "Neither the minister, church-wardens, nor any other officers of the church, shall suffer any man to preach within their churches or chapels, but such as, by showing their licence to preach, shall appear unto them to be sufficiently authorized thereunto, as is aforesaid." Canon 50.

Can. 51, as to preaching in any cathedral or collegiate church, has been already set forth (*r*). Canon 51.

Can. 52. "That the bishop may understand (if occasion so require) what sermons are made in every church of his diocese, and who presume to preach without licence, the church-wardens and side-men shall see that the names of all preachers which come to their church from any other place, be noted in a book, which they shall have ready for that purpose; wherein every preacher shall subscribe his name, the day when he preached, and the name of the bishop of whom he had licence to preach." Canon 52.

In the case of *The Bishop of Down and Connor v. Miller* (*s*), it was holden by Dr. Radcliff, Vicar-General of the Archbishop of Armagh, that the bishop has the power to inhibit at his pleasure a beneficed and licensed clergyman of another diocese from officiating or preaching in his diocese without his licence, though such clergyman have the permission of the incumbent. It would seem that there would be an appeal from such inhibition to the archbishop. Bishop's power to inhibit.

Can. 53. "If any preacher shall in the pulpit particularly or namely of purpose impugn or confute any doctrine delivered by any other preacher in the same church, or in any church near adjoining, before he hath acquainted the bishop of the diocese therewith, and received order from him what to do in that case, because upon such public dissenting and contradicting there may grow much offence and disquietness unto the people, the church-wardens or party grieved shall forthwith signify the same to the said bishop, and not suffer the said preacher any more to occupy that place which he hath once abused, except he faithfully promise to forbear all such matter of contention in the church, until the bishop hath taken further order therein: who shall with all convenient speed so proceed therein, that public satisfaction may be made in the congregation where the offence was given. Provided that if either of the parties offending do appeal, he shall not be suffered to preach *pendente lite*." Canon 53.

Can. 54. "If any man licensed heretofore to preach by any archbishop, bishop, or by either of the universities shall at any time from henceforth refuse to conform himself to the laws, Canon 54.

(*r*) Vide *supra*, p. 136.

(*s*) 11 Ir. Ch., Appendix, p. 1; 5 L. T. p. 30.

ordinances and rites ecclesiastical established in the Church of England, he shall be admonished by the bishop of the diocese or ordinary of the place to submit himself to the use and due exercise of the same. And if, after such admonition he do not conform himself within the space of one month, we determine and decree that the licence of every such preacher shall thereupon be utterly void and of none effect."

No reward
for licence to
preach.

By 31 Eliz. c. 6, s. 9, it is in effect provided that if any person shall receive or take any money, fee, reward, or any other profit, directly or indirectly, or any promise thereof, either to himself or to any of his friends (all ordinary and lawful fees only excepted), to procure any licence to preach, he shall forfeit 40*l.* (*t*).

Canons as to
preaching.

After the preacher shall be licensed, then it is ordained as follows by the Canons of 1603:—

Canon 45.

Can. 45. "Every beneficed man allowed to be a preacher, and residing on his benefice, having no lawful impediment, shall in his own cure, or in some other church or chapel, where he may conveniently, near adjoining, where no preacher is, preach one sermon every Sunday of the year; wherein he shall soberly and sincerely divide the word of truth, to the glory of God, and to the best edification of the people."

Canons 46 and
47.

By Canons 46 and 47, already set forth (*u*), incumbents not preachers were to procure sermons to be preached by licensed preachers once a month, and any incumbent licensed not to reside was (except in certain cases) to have a curate "that is a sufficient and licensed preacher."

But these Canons are now nearly obsolete.

Canon 55.

Can. 55. "Before all sermons, lectures, and homilies, the preachers and ministers shall move the people to join with them in prayer, in this form, or to this effect, as briefly as conveniently they may; 'Ye shall pray for Christ's holy catholic church, that is, for the whole congregation of Christian people dispersed throughout the whole world, and especially for the churches of England, Scotland, and Ireland: and herein I require you most especially to pray for the king's most excellent majesty, our sovereign lord James, king of England, Scotland, France, and Ireland, defender of the faith, and supreme governor in these his realms, and all other his dominions and countries, over all persons, in all causes, as well ecclesiastical as temporal: ye shall also pray for our gracious queen Anne, the noble prince Henry, and the rest of the king and queen's royal issue: ye shall also pray for the ministers of God's holy word and sacraments, as well archbishops and bishops, as other pastors and curates: ye shall also pray for the king's most honourable council, and for all the nobility and magistrates of this realm, that all and every of these in their several callings may serve truly and painfully to the glory of God, and the

The bidding
prayer.

(*t*) Vide *infra*, Part IV., Chap. III., sect. 3. (*u*) Vide *supra*, p. 423.

edifying and well governing of his people, remembering the account that they must make: also ye shall pray for the whole commons of this realm, that they may live in the true faith and fear of God, in humble obedience to the king, and brotherly charity one to another. Finally, let us praise God for all those which are departed out of this life in the faith of Christ, and pray unto God that we may have grace to direct our lives after their good example; that this life ended, we may be made partakers with them of the glorious resurrection in the life everlasting;’ always concluding with the Lord’s Prayer.”

The like form was enjoined by the Injunctions of Queen Elizabeth in the year 1559; and a form of bidding was likewise prescribed (but of a different tenor from these two) by the Injunctions of Edw. VI.; and also before this (and before the Reformation) we find the like bidding form in English, in a festival printed in the year 1509, which is much longer than these, and is reprinted at length by Dr. Burnet in his History of the Reformation.

The occasion of this kind of bidding prayer (as it is called) was that in the ancient church silence was commanded to be kept for a time, for the people’s secret prayers; and in this or such like form the minister directed the people what to pray for. A remainder of which usage is still preserved in the office of ordination of priests (x).

In the year 1661 there is an entry in the journal of the upper house of convocation, that the bishops unanimously voted for one form of prayer to be used by all ministers, as well before as after sermon; and that this order was pursued in the convocation (although not brought to effect) appears from the minutes of the lower house, where on January 31st we find a committee appointed for this (among other purposes), to compile a prayer before sermon (y).

Form of
prayer before
sermon.

Peecham. “Every priest shall explain to the people, four times a year, the fourteen articles of faith, the Ten Commandments, the two evangelical precepts, the seven works of mercy, the seven deadly sins, with their consequences, the seven principal virtues, and the seven sacraments of grace (z).

What the
priest shall
explain.

The fourteen articles of faith (whereof seven belong to the mystery of the Trinity, and seven to Christ’s humanity), are 1. The unity of the divine essence in the three persons of the undivided Trinity. 2. That the Father is God. 3. That the Son is God. 4. That the Holy Ghost, proceeding from the Father and the Son, is God. 5. The creation of heaven and earth by the whole and undivided Trinity. 6. The sanctification of the church by the Holy Ghost, the sacraments of grace, and all other things wherein the Christian Church communicateth. 7. The consummation of the church in eternal glory, to be truly

(x) 1 Warn. p. 28.
(y) Gibs. p. 311.

(z) Lind. p. 54.

raised again in flesh and spirit, and opposite thereunto the eternal damnation of the reprobate. 8. The incarnation of Christ. 9. His being born of the Blessed Virgin. 10. His suffering and death upon the cross. 11. His descent into hell. 12. His resurrection from the dead. 13. His ascension into heaven. 14. His future coming to judge the world (*a*).

The Ten Commandments are the precepts of the Old Testament. To these the gospel addeth two others, to wit, the love of God and of our neighbour (*b*).

Of the seven works of mercy, six are collected out of the gospel of St. Matthew; to feed the hungry, to give drink to the thirsty, to entertain the stranger, to clothe the naked, to visit the sick, and to comfort those that are in prison; and the seventh is gathered out of Tobias, to wit, to bury the dead. The seven deadly sins are pride, envy, anger, or hatred, slothfulness, covetousness, gluttony, and drunkenness, luxury. The seven principal virtues are faith, hope and charity, which respect God; prudence, temperance, justice, fortitude with regard unto men.

The seven sacraments of grace are baptism, confirmation, orders, penance, matrimony, the eucharist and extreme unction (*c*).

Homilies.

By the rubric after the Nicene Creed: "Then shall follow the sermon, or one of the homilies already set forth or hereafter to be set forth by authority."

By the form of ordaining deacons: "It appertaineth to the office of a deacon . . . to read holy scriptures and homilies in the church."

Article 35.

Art. 35 of the 39 Articles. "The second book of homilies, the several titles whereof we have joined unto this article, doth contain a godly and wholesome doctrine, and necessary for these times, as doth the former book of homilies, which were set forth in the time of Edward the Sixth; and therefore we judge them to be read in churches by the ministers diligently and distinctly, that they may be understood of the people."

Canons 46 and 49.

Canons 46 and 49 of the Canons of 1603 on the subject of the homilies have been already given (*d*).

Sermon without service.

Sect. 6 of the Act of Uniformity Amendment Act, 1872, allows the preaching of a sermon without previous service, if preceded by the bidding prayer, and collect, with or without the Lord's Prayer or by any service authorized by that Act (*e*).



SECT. 10.—*Publication of Notices in Church.*

Publication of ecclesiastical matters in the church.

After the Nicene Creed in the Prayer Book there is this rubric: "The curate shall declare unto the people what holy-days or fasting days are in the week following to be observed. And then

(*a*) Lind. pp. 2—8.

(*b*) Ibid. pp. 54, 59.

(*c*) Ibid. pp. 42, 43, 60—63.

(*d*) Vide supra, pp. 423, 787.

(*e*) Vide supra, pp. 447, 757.

also (if occasion be) shall notice be given of the communion; and briefs, citations, and excommunications read. And nothing shall be proclaimed or published in the church, during the time of divine service, but by the minister: nor by him any thing, but what is prescribed in the rules of this book, or enjoined by the queen, or by the ordinary of the place.”

By 4 Geo. 4, c. 76, s. 2, Banns of matrimony shall be published “during the time of morning service, or of evening service (if there shall be no morning service in such church or chapel upon the Sunday upon which such banns shall be so published) immediately after the second lesson.” Banns.

The construction of this section has been discussed in the Chapter on Marriage (*f*).

In *Elphinstone v. Purchas* (*g*) one of the articles charged as follows:—

“That you, the said Rev. John Purchas, . . . publicly during the performance of divine service, that is to say, at the conclusion of the Nicene Creed, gave notice that on the morning of the next day there would be ‘a high celebration of the holy ‘eucharist’ at eleven o’clock; and that you, on the same day, after the sermon, gave or caused to be given, notice that on the next Friday, ‘being the Feast of St. Leonard,’ there would be a celebration of the holy eucharist at eleven o’clock; and that on Sunday, . . . after the Nicene Creed, you gave notice that the Holy Eucharist would be celebrated on Wednesday, ‘being ‘the Feast of St. Martin;’ and on Friday, ‘being the Feast of ‘St. Britius.’ And that on Sunday morning, . . . after the Nicene Creed, you gave notice that ‘on Tuesday next, being ‘the Festival of our Lady, there would be a high celebration of ‘the holy eucharist at eleven o’clock in the morning.’” *Elphinstone v. Purchas.*

Sir Robert Phillimore observed: “The Prayer Book does not warrant, in my opinion, this particular mode of announcing that the eucharist will be celebrated. According to the rubric, after the Nicene Creed notice is then to be given of the communion, and according to the rubric after the church militant prayer, ‘When the minister giveth warning for the celebration ‘of the holy communion . . . after the sermon or homily ‘ended he shall read this exhortation following.’ It appears to me that the epithet ‘high’ has no sanction from the rubric, and, though perhaps in itself not very material, cannot legally be used. It appears from the evidence that at different times notices were given that the feasts of St. Leonard, St. Martin, and St. Britius would be observed. The rubric, after the Nicene Creed, directs that ‘the curate shall declare unto the ‘people what holy-days or fasting days are in the week following to be observed.’ Mr. Purchas is not charged with having violated the law by omitting to give notice of these Form of giving notice of the Holy Communion.

Notice not to be given of black-letter saints’ days.

(*f*) Vide supra, pp. 588—590.

(*g*) L. R., 3 Adm. & Eccl. p. 66. See *Newbery v. Goodwin*, 1 Phillim. p. 282; supra, p. 765.

holy-days or fasting days, but by having given notice of holy-days which the church has not directed to be observed. I think the holy-days which are directed to be observed are those which are to be found after the preface of the Prayer Book, under the head of 'A Table of all the Feasts that are to be observed in the Church of England throughout the year.' The feasts of St. Leonard, St. Martin, and St. Britius are not among these; I therefore think the notices of them were improper, and I must admonish Mr. Purchas to abstain from giving such notices for the future."

Publication of acts of parliament formerly in church.

7 Will. 4 & 1 Vict. c. 45.

Divers acts of parliament were at one time required to be published in the churches, but the provisions requiring such publication of these statutes have been repealed.

The act 7 Will. 4 & 1 Vict. c. 45, after reciting as follows: "Whereas by an act, 58 Geo. 3, c. 69, intituled, 'An Act for the Regulation of Parish Vestries,' it is enacted, that no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel on some Sunday during or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel: And whereas by an act, 31 Eliz. c. 3, it is enacted, that before any outlawry shall be had and pronounced proclamation shall be made at the door of the church or chapel of the town or parish where the defendant shall be dwelling immediately after divine service on a Sunday: And whereas by divers acts relative to the assessing and collecting of highway and poor rates and land tax, and other matters, it is directed or required that public notice shall be given with reference to certain proceedings relating thereto respectively in the parish churches or chapels during divine service: And whereas by ancient custom notice is usually given in churches during divine service of the times appointed for holding courts leet, courts baron, and customary courts: And whereas it is expedient that such mode of giving notices should be altered:"—Enacts as follows,

Notices not to be given in churches during divine service, &c.

Notices heretofore usually given during or after divine service, &c. to be affixed to the church doors.

Sect. 1. "No proclamation or other public notice for a vestry meeting or any other matter shall be made or given in any church or chapel during or after divine service, or at the door of any church or chapel at the conclusion of divine service."

Sect. 2. "All proclamations or notices which under or by virtue of any law or statute, or by custom or otherwise, have been heretofore made or given in churches or chapels during or after divine service, shall be reduced into writing, and copies thereof either in writing or in print, or partly in writing and partly in print, shall previously to the commencement of divine service on the several days on which such proclamations or

notices have heretofore been made or given in the church or chapel of any parish or place, or at the door of any church or chapel, be affixed on or near to the doors of all the churches and chapels within such parish or place; and such notices when so affixed shall be in lieu of and as a substitution for the several proclamations and notices so heretofore given as aforesaid, and shall be good, valid, and effectual to all intents and purposes whatsoever."

Sect. 3. "No such notice of holding a vestry shall be affixed on the principal door of such church or chapel unless the same shall previously have been signed by a churchwarden of the church or chapel, or by the rector, vicar, or curate of such parish, or by an overseer of the poor of such parish; but every such notice so signed shall be affixed on or near to the principal door of such church or chapel."

Notices for holding vestries to be signed as herein directed.

Sect. 4. "No decree relating to a faculty, nor any other decree, citation, or proceeding whatsoever in any ecclesiastical court, shall be read or published in any church or chapel during or immediately after divine service."

Decrees of ecclesiastical courts, &c. not to be read in churches.

Sect. 5. "Nothing in this act shall extend or be construed to extend to the publication of banns, nor to notice of the celebration of divine service or of sermons, nor to restrain the curate, in pursuance of the rules in the Book of Common Prayer, from declaring unto the people what holy-days or fasting days are in the week following to be observed, nor to restrain the minister from proclaiming or publishing what is prescribed by the rules of the Book of Common Prayer, or enjoined by the Queen or by the ordinary of the place."

Act not to extend to notices purely ecclesiastical.

CHAPTER XII.

SUNDAYS, HOLIDAYS AND FASTS.

Due observa-
tion of the
Lord's Day.
Canon 13.

By Can. 13 of 1603, "All manner of persons within the Church of England shall from henceforth celebrate and keep the Lord's Day, commonly called Sunday, and other holy-days according to God's holy will and pleasure and the orders of the Church of England prescribed in that behalf; that is, in hearing the word of God read and taught; in private and public prayers; in acknowledging their offences to God, and amendment of the same; in reconciling themselves charitably to their neighbours, where displeasure hath been; in oftentimes receiving the communion of the body and blood of Christ; in visiting of the poor and sick; using all godly and sober conversation."

29 Car. 2, c. 7.

By 29 Car. 2, c. 7, s. 1, All persons "shall on every Lord's Day apply themselves to the observation of the same by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and no tradesman, artificer, workman labourer or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day or on any part thereof (works of necessity and charity only excepted), and every person being of the age of fourteen years and upwards offending in the premises shall for every such offence forfeit the sum of 5s." No person "shall publicly cry show forth or expose to sale any wares, merchandizes, fruit, herbs, goods or chattels whatsoever, upon the Lord's Day or any part thereof," on pain of forfeiting the same.

By sect. 2, "No drover horse-courser waggoner butcher higgler their, or any of their servants, shall travel or come unto his or their inn or lodging upon the Lord's Day or any part thereof," on pain of 20s. "No person or persons shall use employ or travel upon the Lord's Day with any boat wherry (a), lighter or barge (except it be upon extraordinary occasion to be allowed by some justice of the peace of the county, or head officer or some justice of peace of the city, borough or town corporate where the fact shall be committed)," on pain of 5s. If any person offending in any of the premises shall be thereof convicted before any justice of the peace of the county, or chief officer or justice of the peace of the city, borough or town corporate where the offence shall be committed, on view or confession

(a) But see 7 & 8 Geo. 4, c. lxxv, and now 22 & 23 Vict. c. cxxxiii, local acts for the River Thames.

or oath of one witness; the said justice or chief officer shall give warrant to the constables or churchwardens of the parish where the offence shall be committed, to seize the said goods cried, showed forth, or put to sale as aforesaid, and to sell the same, and to levy the said other forfeitures or penalties by distress and sale; and in default of such distress, or in case of insufficiency or inability of the said offender to pay the said forfeitures or penalties, then the party offending be set publicly in the stocks by the space of two hours. And all the forfeitures or penalties aforesaid shall be employed and converted to the use of the poor of the parish where the offence shall be committed, save only that such justice, mayor or other head officer may reward the informer out of the same, not exceeding the third part. The act, however, provides that nothing therein contained "shall extend to the prohibiting of dressing of meat in families, or of dressing or selling of meat in inns, cookshops or victualling houses, for such as otherwise cannot be provided; nor to the crying or selling of milk before nine of the clock in the morning or after four of the clock in the afternoon." Prosecution for the said offences is to be in ten days.

On this act the following cases have occurred. *Rex v. Cox* Cases on this act as to bakers. was a motion for an information against a justice of the peace, for refusing to proceed upon an information against a baker, who baked puddings and pies, and other such things for dinner. The court were of opinion that this was not an offence within the act, it being a work of necessity and charity, and within the equity of the proviso relating to a cook's shop; and Foster, J., said it is better that one baker and his men should stay at home, than many families and servants (*b*). Afterwards a baker was convicted, by four separate convictions, for selling hot loaves on the same Sunday. But the court said that there could be but one entire offence on the same day, and therefore only one penalty of 5s. (*c*). And in 34 Geo. 3, a baker having been convicted on the statute for baking meat and pastry for his customers on a Sunday, Lord Kenyon, Chief Justice, said: "Must the laborious part of the community, who are entitled to some indulgence for the labours of the past week, fare harder on that than on any other day? many of them have not the means of dressing their dinners at home . . . That day will, I think, be better observed, if the construction put upon this law in *Rex v. Cox* be now adopted, than if we overrule that determination." And the conviction was quashed (*d*).

In *Rex v. Whitnash* (*e*), it was held that the statute 29 Car. 2, c. 7, prohibits only the labour, business or work done in the course of a man's ordinary calling. It does not apply to a contract of Contracts of service.

(*b*) 2 Burr. p. 785.

(*c*) *Crepps v. Durden*, 2 Cowp. p. 640.

(*d*) *Rex v. Younger*, 5 T. R. p. 449.

(*e*) 1 M. & R. p. 452; S. C., 7 B. & C. p. 596.

hiring; therefore a contract for a year, made on a Sunday, between a farmer and a labourer, is valid, and service under such a contract confers a settlement.

Contracts of
sale.

The real purport of the words "ordinary calling," is fully explained by Chief Justice Mansfield, in *Drury v. Defontaine* (*f*), which contains also a clear exposition of the common law on the observation of the Sunday. He said: "The bargaining for and selling horses on a Sunday is certainly a very indecent thing, and what no religious person would do. But we cannot discover that the law has gone so far as to say that every contract made on a Sunday shall be void, although under these penal statutes, if any man, in the exercise of his ordinary calling, should make a contract on the Sunday, that contract would be void. It appears that the horse was not sent to Hull for the purpose of private sale, but for the purpose of being sold by auction; for it may be gathered from the evidence that Hull keeps a repository for sale by auction. Therefore Hull did not sell this horse, properly speaking, as a horse dealer. It is said by Lord Coke, that the Christian religion is part of the common law, and such a sale certainly is directly contrary to the practice of those religious duties, which it was the purpose of the legislature to enforce, as expressed in the preamble of the statute 29 Car. 2, c. 7, 'that every person whatsoever shall on the 'Lord's Day apply themselves to the observation of the same, 'by exercising themselves thereon in the duties of piety and 'true religion publicly and privately;' which certainly is not likely to be done by those whose minds are engaged in making bargains and selling horses. Lord Coke (*g*) cites a Saxon law of King Ethelstan, the latter part of which is, *Die autem dominica nemo mercaturam facito; id quod si quis egerit et ipsâ merce, et triginta praterca solidis mulctator*; upon which Lord Coke observes, 'Here note, by the way, that no merchandising shall 'be on the Lord's Day.' But it does not appear that the common law ever considered those contracts as void which were made on a Sunday. In *Comyns v. Boyer* (*h*), the defendant pleaded a sale in open fair, but in stating the right to hold the fair, he did not except the case of the fair day falling on a Sunday, and it was urged that the plea was bad, because a fair held on that day would be illegal, as coming within the statute 27 Hen. 6, c. 5, of fairs and markets. The court determined that the holding a fair on that day would be illegal, but that the contract would not be void. The law is since changed, and if any act is forbidden under a penalty, a contract to do it is now held void. But though that case is not now law, it shows that there was nothing in the common law which would avoid a sale made on the Sunday; otherwise this mention of the statutes would not have been introduced. The 29 Car. 2, c. 4, is the only

(*f*) 1 Taun. p. 135.
(*g*) 2 Inst. p. 220.

(*h*) Cro. Eliz. p. 485.

statute that can possibly apply here. It enacts, that 'no person ' whatsoever shall do or exercise any worldly labour, business ' or work of their ordinary callings upon the Lord's Day.' To bring this case within the act, we must pronounce that either Drury or Hull worked within their ordinary callings on the Sunday. But the sale of horses by private contract was not Drury's ordinary calling, nor was it Hull's; his calling was that of a horse auctioneer, and he was not within his ordinary calling in selling this horse by private contract; and therefore, although it is to be lamented, the sale must be held good, and the rule discharged" (i).

By 34 & 35 Vict. c. 87, "The Sunday Observation Prosecution Act, 1871," which was to be in force only to the 1st of September, 1872, sect. 1, "No prosecution or other proceedings shall be instituted against any person or the property of any person for any offence committed by him under "29 Car. 2, c. 7," or for the recovery of any forfeiture or penalty for any such offence, except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed, or with the consent in writing of two justices of the peace or a stipendiary magistrate having jurisdiction in the place where such offence is committed. No such prosecution shall be heard before the justices of the peace or stipendiary magistrate by whom or with whose consent the same has been instituted."

The terms "police districts" and "chief officers of police" are thus defined by sect. 2 and the schedule.

34 & 35 Vict. c. 87.

No prosecution on preceding statute, but with leave of certain officers.

Police District.	Chief Officer of Police.
The City of London and the liberties thereof, exclusive of Southwark.	The Commissioner of Police of the City.
The Metropolitan police district.	The Commissioner of Police of the Metropolis.
Any county, any riding, parts, division or liberty of county, any borough or town maintaining a separate police force.	The chief constable or head constable or other officer, by whatever name called, having the chief command of the police in the police district.

This act has since been annually continued.

By 2 Geo. 3, c. 15, s. 7, "Fish carriages (for the supply chiefly of the markets within London and Westminster) shall be allowed to pass on Sundays or holidays whether laden or returning empty."

Fish carriages.

(i) See also the cases of *Sandiman v. Breach*, 7 B. & C. p. 96; 9 D. & R. p. 796; *Fennell v. Ridler*, 5 B. & C. p. 406; 8 D. & R. p. 204;

Bloxsome v. Williams, 3 B. & C. p. 232; 5 D. & R. p. 82; *Smith v. Sparrow*, 12 Mo. p. 272; 4 Bing. p. 86.

Barbers and
butchers.

In the register of Archbishop Chicheley, we find a special declaration, forbidding the barbers of London to exercise their calling on the Lord's Day; and in a visitation of Archbishop Warham, we find barbers and butchers presented in the spiritual court, for exercising their several trades on that day, and admonished to forbear it, on pain of ecclesiastical censures (*j*).

Bakers in the
metropolis.

Provisions against baking on Sundays, in the city of London, within the bills of mortality or within ten miles of the Royal Exchange, are made by 3 Geo. 4, c. evi.; and similar provisions against persons exercising the trade of baker beyond those limits by 6 & 7 Will. 4, c. 37, s. 14.

27 Hen. 6,
c. 5.

Fairs and
markets on
Sundays and
great holy
days.

By 27 Hen. 6, c. 5, "Considering the abominable injuries and offences done to Almighty God, and to his saints always aiders and singular assisters in our necessities, because of fairs and markets upon their high and principal feasts, as in the feast of the Ascension of our Lord, in the day of Corpus Christi, in the day of Whit Sunday, in Trinity Sunday, with other Sundays, and also in the high feast of the Assumption of our Blessed Lady, the day of All Saints, and on Good Friday, accustomedly and miserably holden and used in the realm of England; in which principal and festival days, for great earthly covetise, the people is more willingly vexed, and in bodily labour foiled, than in other ferial days, as in fastening and making their booths and stalls, bearing and carrying, lifting and placing their wares outward and homeward, as though they did nothing remember the horrible defiling of their souls in buying and selling, with many deceitful lies, and false perjury, with drunkenness and strifes, and so specially withdrawing themselves and their servants from divine service;" it is ordained, "that all manner of fairs and markets in the said principal feasts and Sundays, and Good Friday, shall clearly cease from all showing of any goods or merchandizes, necessary victual only except, upon pain of forfeiture of all the goods aforesaid so shewed, to the lord of the franchise or liberty where such goods contrary to this ordinance be or shall be showed" (*k*). Nevertheless the king of his special grace, by authority of the parliament, "granteth to them power, which of old time have no day to hold their fair or market, but only upon the festival days aforesaid, to hold by the same authority and strength of his old grant, within three days next before the said feasts, or next after, proclamation first made to the simple common people upon which day the aforesaid fair shall be holden, always to be certified without any fine or fee to be taken to the king's use. And they which of old time have, by special grant, sufficient days before the feasts aforesaid, or after, shall in like manner as is aforesaid hold their fairs and markets the full number of their days; the said festivals and Sundays, and Good Fridays except.

(*j*) Gibs. p. 238.

(*k*) Here followed these words,
"the four Sundays in harvest ex-

cept," now repealed by 13 & 14
Vict. c. 23.

"Provided always, that this present ordinance shall . . . endure until the next parliament, and so forth; except in the said parliament a reasonable cause be alleged, shewed and proved, for the which it shall seem not expedient that the aforesaid ordinance so shall endure."

Within three days next before the said Feast, or next after.—In the 8 & 9 of Queen Elizabeth, a bill was read the first and second time, to avoid fairs and markets on Sunday, to the next working day following; which therefore seems to be the bill that had been prepared in the convocation of 1562, whereby it was provided, that upon every Sabbath day, and principal feast day, be kept neither open fair nor market throughout the year; and that all persons or corporations, having by patent such days expressed, may change the same days with the days immediately following or going before the said Sundays or principal feast day (*l*).

In the third year of King Charles the First, a national fast having been appointed, the Bishop of Winchester was directed to move the king, that whereas on that day divers fairs and markets were granted to divers towns by charter, his majesty would be pleased, that in those places they might have liberty to keep the said fast the next day after the said fairs ended, notwithstanding his majesty's proclamation to that day; with which his majesty was well pleased, and the bishops of each diocese were directed by the house to take care accordingly (*m*).

By 1 Car. 1, c. 1, "Forasmuch as there is nothing more acceptable to God than the true and sincere service and worship of him according to his holy will, and that the holy keeping of the Lord's day is a principal part of the true service of God, which in very many places of this realm hath been and now is profaned and neglected by a disorderly sort of people, in exercising and frequenting bear-baiting, bull-baiting, enterludes, common plays, and other unlawful exercises and pastimes upon the Lord's day; and for that many quarrels, bloodsheds, and other great inconveniences, have grown by the resort and concourse of people going out of their own parishes to such disordered and unlawful exercises and pastimes, neglecting divine service both in their own parishes and elsewhere:" it is enacted that, "there shall be no meetings assemblies or concourse of people, out of their own parishes on the Lord's day . . . for any sports and pastimes whatsoever; nor any bear-baiting, bull-baiting, enterludes, common plays, or other unlawful exercises and pastimes, used by any persons within their own parishes." And every person offending in any of the premises shall forfeit for every offence 3s. 4d. to the use of the poor. And any justice of the peace of the county, or the chief officer of a city, borough, or town corporate, where the offence shall be committed, who on his own view, or confession of the party, or proof of any one or more

1 Car. 1, c. 1.
Certain public
gatherings for
sports on
Sundays pro-
hibited.

(*l*) Gibs. p. 242.

(*m*) Gibs. p. 242.

witness or witnesses by oath, shall find any person offending in the premises, shall give warrant under his hand and seal to the constables and churchwardens of the parish where the offence shall be committed, to levy the said penalty so assessed by distress and sale; and in default of such distress, that the party offending be set publicly in the stocks by the space of three hours. It is provided that no man be impeached by this act except he be called in question within one month next after the offence committed; and that the ecclesiastical jurisdiction shall not be abridged; but that the ecclesiastical court may punish the said offences as if this act had not been made.

The keeping holy of the Lord's Day.—Which duty Lindwood thus describes: to keep it holy and pure with reverence, that is to say, generally, by ceasing on that day from wickedness; particularly by resting from bodily labour, which hinders the operations of the soul towards God; and most especially, by employing it wholly in divine contemplations. And elsewhere, Lindwood says, we must rest wholly unto God. From which, and from the many laws that were made in the times of our Saxon ancestors against profaning the Lord's day, Bishop Stillingfleet draws this conclusion, That the religious observation of the Lord's day is no novelty, started by some sects and parties among us; but that it has been the general sense of the best part of the Christian world, and is particularly enforced upon us of the Church of England, not only by the homilies, but by the most ancient ecclesiastical laws amongst us.

The book of sports.

Accordingly (before the book of sports had been set forth by King James the First) not only the Injunctions of Edward the Sixth and Queen Elizabeth had specially enforced this duty; but a bill had been provided by the bishops, in the twelfth year of Queen Elizabeth, for enforcing the observation of it; and divers bills for that end had also been actually brought into parliament: one, in the 27 Eliz., entitled, A bill for the better and more reverend observing of the Sabbath day; which having passed both houses after great disputation, was denied the royal assent, probably upon the dislike the queen had of the parliament's intermeddling in matters of religion. Three attempts of the like nature were also made in the reign of King James the First, as appears by the journals of parliament in the several years; and (after what had been done in the first and in the third year of King Charles the First) we find a bill in parliament in the sixteenth of Charles the Second, for punishing divers abuses committed on the Lord's day; and in the same year, when a bill for the better observation of the Lord's day was prepared for the royal assent, and ready to be passed, it was stolen, and could not be recovered upon a strict examination made by the house of lords (n).

There shall be no Meetings, Assemblies, or Concourse of People, out of their own Parishes, on the Lord's Day, for any Sports and

(n) Gibs. p. 236.

Pastimes whatsoever.—This also was provided against in King James's book of sports: "We likewise do straightly command that every person shall resort to his own parish church, to hear divine service, and each parish by itself to use the said recreation after divine service" (o).

For any Sports and Pastimes whatsoever.—King James I., in the aforesaid book of sports, in the year 1618, publicly declared to his subjects these games following to be lawful: viz., dancing, archery, leaping, vaulting, May-games, Whitsun ales, and morris dances; and did command that no such honest mirth or recreation should be forbidden to his subjects on Sundays after evening service: but restraining all recusants from this liberty; and commanding each parish (as was said before) to use these recreations by itself; and prohibiting all unlawful games, bear-baiting, bull-baiting, interludes, and bowling by the meaner sort (p).

Killing game, or using a dog, net or gun on a Sunday or Christmas day, is forbidden by 1 & 2 Will. 4, c. 32, s. 3. Killing game.

By 21 Geo. 3, c. 49, "Whereas certain houses, rooms or places, within the cities of London and Westminster, or in the neighbourhood thereof, have of late been frequently opened for public entertainment or amusement, upon the evening of the Lord's day, commonly called Sunday; and at other houses, rooms or places within the said limits, under pretence of inquiring into religious doctrines, and explaining texts of Holy Scripture, debates have frequently been held on the evening of the Lord's day concerning divers texts of Holy Scripture by persons unlearned and incompetent to explain the same, to the corruption of good morals, and to the great encouragement of irreligion and profaneness;" it is enacted, that "any house, room or other place, which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's day called Sunday, and to which persons shall be admitted by the payment of money or by tickets sold for money, shall be deemed a disorderly house or place:" and the keeper of such house shall forfeit 200*l.* for every Sunday the same shall be so used as aforesaid, and be otherwise punishable as the law directs in cases of disorderly houses; and the person managing the same, or acting as master of the ceremonies, or as moderator, president, or chairman in any such debate, shall forfeit 100*l.*; and the door-keeper or other person delivering out tickets, 50*l.*; and any person advertising such amusement shall also forfeit 50*l.* The penalties are to be recovered, with full costs, in any of his majesty's courts of record at Westminster, by any person who shall sue for the same, within six calendar months after the offence committed. Provided, that nothing herein shall be construed to abridge the ecclesiastical juris-

21 Geo. 3,
c. 49.
Houses of en-
tertainment.

(o) Gibs. p. 236.

(p) Dalton, c. 46; Gibs. p. 236.

diction, or any of the liberties or immunities of the Toleration Act (q).

In the case of *Barter v. Langley* (r), the facts were these. Meetings were held on Sunday evenings in a hall duly registered for that purpose as a place of religious worship. The proceedings at the meetings consisted of the performance of sacred music and the delivery of an address, which was sometimes of a religious tendency, sometimes neutral, but never profane. Admission to the body of the hall was gratuitous, but tickets were sold and money taken for admission to reserved seats. The object of the persons who held the meetings was not pecuniary gain, and they honestly intended to introduce religious worship, though not according to any established or usual form. It was holden, that the proceedings at the meetings were not an entertainment or amusement within the act.

In *Terry v. The Brighton Aquarium Co.* (s), and *Warner v. The Brighton Aquarium Co.* (t), the opening of the Brighton Aquarium on Sunday was holden to be unlawful within the Act of 21 Geo. 3, c. 49.

By 38 & 39 Vict. c. 80, the crown may remit any penalties recovered under 21 Geo. 3, c. 49.

Whether
process to be
served.

By 29 Car. 2, c. 7, s. 6, "No person or persons upon the Lord's day, shall serve or execute, or cause to be served or executed, any writ, process, warrant, order, judgment or decree (except in cases of treason, felony or breach of the peace); but the services of every such writ, &c., shall be void to all intents and purposes whatsoever; and the person so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, process, warrant, order, judgment or decree at all."

Before this statute, one might have been attached for arresting another on Sunday (as in *Prinsor's case* (u), in 16 Car. 1, who was fined 20s. for so doing): but with this circumstance, that he might have arrested him upon any other day of the week. Agreeably to which, Kelynge, Ch. J., said, upon such a motion, that he had known many attachments for arresting a man upon a Sunday, but still the affidavit contained that he might have been taken on another day; to which Twisden, J., added, that so also it was for arresting a man as he was going to church, to disgrace him (x).

As to Eccle-
siastical pro-
cess.

A libel was exhibited in the spiritual court of Durham against a woman for incontinence, and the citation was fixed upon the church door on a Sunday, according to custom; upon which it was urged as the opinion of civilians, that such citation was sufficient without a personal serving, and that this had been the constant practice both before and since this statute: and Holt, Chief Justice, said, if the ecclesiastical law was and had always

(q) 1 Will. & Mar. c. 18.

(r) L. R., 4 C. P. p. 21.

(s) L. R., 10 Q. B. p. 306.

(t) L. R., 10 Ex. p. 291.

(u) Cro. Car. p. 602.

(x) Anon. 1 Mod. p. 56.

been to serve this process on a Sunday (in which respect it was different from temporal process, which may be as well served on any other day), that then it did not seem to be the intent of this statute to take away the serving it in that manner, which is only meant of processes that may as well be executed at any other time (*y*).

By 6 Ann. c. 12, s. 4, a judge's warrant for apprehending a person escaped out of the King's Bench or Fleet Prison, might be executed on the Lord's day.

By Order LXVII. rule 12 of the Rules of the Supreme Court of Judicature, 1883, no instrument except a warrant shall be served on a Sunday, Good Friday, or Christmas-day.

By 29 Car. 2, c. 7, s. 5, if any person which shall travel upon the Lord's day, shall be then robbed; no hundred, or the inhabitants thereof, shall be charged with or answerable for any robbery so committed; but the person so robbed shall be barred from bringing any action for the said robbery. Robbery.

By the Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, ss. 14, 92, Sunday, Christmas-day and Good Friday, and any day appointed by royal proclamation for a solemn fast or thanksgiving, and any bank holiday under the Acts for that purpose (*z*), count as "non-business days" for the purposes of that Act, and bills of exchange need not be presented or paid on any such day. Bills of exchange.

By 2 & 3 Vict. c. 47, s. 51, the commissioners of police, on the application of the minister or churchwardens of any church, chapel or place of public worship, may make rules for regulating the route of all carriages, horses, droves, &c., during the hours of Divine Service on Sundays, Christmas-day, Good Friday and days of fast and thanksgiving. Rules for the metropolis.

By the Prison Act, 1865, 28 & 29 Vict. c. 126, s. 41, any prisoner whose term of imprisonment would, according to his sentence, expire on any Lord's day, shall be entitled to his discharge on the Saturday next preceding. Discharge from prison.

By 35 & 36 Vict. c. 96, s. 49, the grant of a licence to a public-house may contain a condition that it shall not be open on Sunday. Public-houses.

By 37 & 38 Vict. c. 49, provisions are made for closing all public-houses for certain hours on Sundays, Christmas-day and Good Friday.

By 44 & 45 Vict. c. 61, all public-houses in Wales are to be closed for the whole of Sunday. But refreshment rooms at railway stations may be opened for the use of passengers.

It is provided by The Factory and Workshop Act, 1878, (41 & 42 Vict. c. 16), s. 21, that a child or young person or woman shall not, saving as in the Act provided, be employed on a Sunday in a factory or workshop. Factories and workshops.

(*y*) *Alanson v. Brookbank*, 5 Mod. p. 449; *S. C. nom. Allen v. Brookbank*, 2 Salk. p. 625.

(*z*) *Vide infra*, p. 809.

Exemption
from penalties
in case of
Jews.

The saving relates to Jewish factories and workshops, as to which it is provided by sect. 51, that no penalty shall be incurred by any person in respect of any work done on Sunday in a workshop or factory by any person or woman professing the Jewish religion; provided that the workshop or factory is in the occupation of a person professing the Jewish religion, and is on Saturday closed, and is not open for traffic on Sunday.

Sect. 50 of the same Act enables a Jewish employer, if all the children, young persons and women in his workshop or factory are of the Jewish religion, to give by notice publicly fixed any two of the public holidays fixed under 38 & 39 Vict. c. 13 (z), in lieu of Christmas-day and Good Friday.

Feasts.
5 & 6 Edw. 6,
c. 3.

By 5 & 6 Edw. 6, c. 3, s. 1, "Forasmuch as at all times men be not so mindful to laud and praise God, so ready to resort and hear God's holy word, and to come to the holy communion and other laudable rites which are to be observed in every Christian congregation, as their bounden duty doth require; therefore to call men to remembrance of their duty, and to help their infirmity, it hath been wholesomely provided, that there should be some certain times and days appointed wherein the Christians should cease from all other kind of labours, and should apply themselves only and wholly unto the aforesaid holy works, properly pertaining unto true religion; . . . and because these be the chief and principal works wherein man is commanded to worship God, and do properly pertain unto the first Table, therefore as these works are most commonly and may also well be called God's service, so the times appointed specially for the same are called holy days not for the matter or nature either of the time or day, nor for any of the saints sake whose memories are had on those days (for so all days and times considered are God's creatures, and all of like holiness), but for the nature and condition of those godly and holy works wherewith only God is to be honoured, and the congregation to be edified, whereunto such times and days are sanctified and hallowed, that is to say, separated from all profane uses, and dedicated and appointed not unto any saint or creature, but only unto God and his true worship; neither is it to be thought, that there is any certain time or definite number of days prescribed in Holy Scripture, but that the appointment both of the time, and also of the number of days, is left by the authority of God's word to the liberty of Christ's Church, to be determined and assigned orderly in every country, by the discretion of the rulers and ministers thereof as they shall judge most expedient to the true setting forth of God's glory, and the edification of their people;" it is therefore enacted, that "all the days hereafter mentioned shall be kept and commanded to be kept holy days, and none other, that is to say, all Sundays in the year, the days of the feast of the Circumcision of our Lord Jesus Christ, of the

Epiphany, of the Purification of the Blessed Virgin, of St. Matthias the Apostle, of the Annunciation of the Blessed Virgin, of St. Mark the Evangelist, of St. Philip and Jacob the Apostles, of the Ascension of our Lord Jesus Christ, of the Nativity of St. John Baptist, of St. Peter the Apostle, of St. James the Apostle, of St. Bartholomew the Apostle, of St. Matthew the Apostle, of St. Michael the Archangel, of St. Luke the Evangelist, of St. Simon and Jude the Apostles, of all Saints, of St. Andrew the Apostle, of St. Thomas the Apostle, of the Nativity of our Lord, of St. Stephen the Martyr, of St. John the Evangelist, of the Holy Innocents, Monday and Tuesday in Easter week, and Monday and Tuesday in Whitsun week; and that none other day shall be kept and commanded to be kept holy day, or to abstain from lawful bodily labour."

By s. 3. "It shall be lawful to all archbishops and bishops in their dioceses, and to all other having ecclesiastical or spiritual jurisdiction, to inquire of every person that shall offend in the premises, and to punish every such offender by the censures of the church, and to enjoin him or them such penance as shall be to the spiritual judge by his discretion thought meet and convenient."

By s. 6, it is provided that "it shall be lawful for every husbandman, labourer, fisherman, and to all and every other person or persons, of what estate, degree or condition he or they be, upon the holy days aforesaid, in harvest or at any other time in the year when necessity shall require, to labour, ride, fish, or work any kind of work, at their free wills and pleasure . . ."

By s. 7, it shall be lawful to the knights of the right honourable Order of the Garter to keep and celebrate solemnly the feast of their order, commonly called St. George's Feast, yearly on the 22nd, 23rd, and 24th days of April, and at such other time and times as yearly shall be thought convenient by the king and the knights.

This act was repealed in the first year of Queen Mary; and in the first of Queen Elizabeth a bill to revive the same was brought into parliament, but passed not; so that the repeal of Queen Mary remained upon this act till the first year of King James the First, when this repeal was taken off. In the mean while the calendar before the Book of Common Prayer had directed what holidays should be observed; and in the articles published by Queen Elizabeth in the seventh year of her reign, one was, that there be none other holidays observed besides the Sundays, but only such as be set out for holidays as in the said statute of the 5 & 6 Edw. 6, and in the new calendar authorized by the Queen's majesty (a).

Our Prayer Book has the following "Table of all the feasts that are to be observed in the Church of England throughout the year:—All Sundays in the year. The days of the Feasts of

(a) Gibs. p. 245.

the Circumcision of our Lord Jesus Christ, the Epiphany, the Conversion of St. Paul, the Purification of the Blessed Virgin, St. Matthias the Apostle, the Annunciation of the Blessed Virgin, St. Mark the Evangelist, St. Philip and St. James the Apostles, the Ascension of our Lord Jesus Christ, St. Barnabas, the Nativity of St. John the Baptist, St. Peter the Apostle, St. James the Apostle, St. Bartholomew the Apostle, St. Matthew the Apostle, St. Michael and all Angels, St. Luke the Evangelist, St. Simon and St. Jude the Apostles, All Saints, St. Andrew the Apostle, St. Thomas the Apostle, the Nativity of our Lord, St. Stephen the Martyr, St. John the Evangelist, the Holy Innocents. Monday and Tuesday in Easter Week, Monday and Tuesday in Whitsun week."

In this table it is observable, that all the same days are repeated as feasts which were enacted to be holidays by the aforesaid statute; and also these two were added, viz. the Conversion of St. Paul, and St. Barnabas, which perhaps were omitted out of the statute because St. Paul and St. Barnabas were not accounted of the number of the twelve. But in the rubric which prescribes the lessons proper for holidays, those two festivals are specified under the denomination also of holidays. But their eves are not appointed by the kalendar, as the eves of the others are, to be fasting days.

Fasting days.
Canon 72.

By Can. 72 of 1603, "No minister or ministers shall, without the licence and direction of the bishop first obtained and had under his hand and seal, appoint or keep any solemn fasts, either publicly or in any private houses, other than such as by law are or by public authority shall be appointed, nor shall be wittingly present at any of them, under pain of suspension for the first fault, of excommunication for the second, and of deposition from the ministry for the third. Neither shall any minister, not licensed as aforesaid, presume to appoint or hold any meetings for sermons, commonly termed by some prophecies or exercises, in market towns or other places, under the said pains: nor without such licence, to attempt upon any pretence whatsoever, either of possession or obsession, by fasting and prayer to cast out any devil or devils, under pain of the imputation of imposture or cozenage, and deposition from the ministry."

2 & 3 Edw. 6, c. 19, with respect to fasting days, is repealed by 19 & 20 Vict. c. 64.

5 & 6 Edw. 6,
c. 3.
Eves of
saints' days.

By 5 & 6 Edw. 6, c. 3, s. 2, "Every even or day next going before any of the aforesaid days of the feasts of the Nativity of our Lord, of Easter, of the Ascension of our Lord, Pentecost, of Purification and the Annunciation of the aforesaid Blessed Virgin, of All Saints, and of all the said feasts of the Apostles, other than of St. John the Evangelist, and Philip and Jacob, shall be fasted, and commanded so to be kept and observed, and that none other even or day shall be commanded to be fasted."

By s. 4 it is provided, that "this act shall not extend to abrogate or take away the abstinence from flesh in Lent, or on Fridays and Saturdays, or any other day which is already appointed so to be kept, by virtue of" the act 2 & 3 Edw. 6, c. 19 (*b*), "saving only of those evens or days whereof the holy day next following is abrogated by this statute."

As to Lent, Fridays and Saturdays.

By s. 5, when any of the said feasts (the evens whereof be by this statute commanded to be observed and kept fasting days) do fall upon the Monday, then the Saturday next before, and not the Sunday, shall be commanded to be fasted for the even of any such feast or holiday.

When feasts fall on Monday.

Other than of St. John the Evangelist, and of Philip and Jacob.]—The one of which falls within the Christmas holidays, and the other within the paschal solemnity, betwixt Easter and Whitsuntide (*c*).

5 Eliz. c. 5, as to fasting, was repealed by 31 & 32 Vict. c. 45. See also 27 Eliz. c. 11, and 35 Eliz. c. 7, also now repealed. Lord Coke said, that both before these acts and since, the eating of flesh on Fridays was punishable in the ecclesiastical courts (*d*).

The Prayer Book has the following table of vigils (which in substance is the same with what is expressed in the aforesaid statute); viz. "the evens or vigils before the Nativity of our Lord, the Purification of the Blessed Virgin Mary, the Annunciation of the Blessed Virgin, Easter day, Ascension day, Pentecost, St. Matthias, St. John Baptist, St. Peter, St. James, St. Bartholomew, St. Matthew, St. Simon and St. Jude, St. Andrew, St. Thomas, All Saints." To this table there is added a note that "if any of these feast days fall upon a Monday, then the vigil or fast day shall be kept upon the Saturday, and not upon the Sunday, next before it."

Prayer Book: As to evens;

The Prayer Book has in the same table the days of fasting or abstinence, which are as follows:—"1. The forty days of Lent. 2. The Ember days, at the four seasons; being the Wednesday, Friday and Saturday after the following days, the first Sunday in Lent, the Feast of Pentecost, September the 14th and December the 13th. 3. The three Rogation days; being the Monday, Tuesday and Wednesday before Holy Thursday or the Ascension of our Lord. 4. All the Fridays in the year, except Christmas-day."

As to days of fasting and abstinence.

The Ember Days.]—Ember days were fasts observed in the church very early, and particularly by the Church of England in the Saxon times, who called them *ymbryne dagas*, from whence (and not from *embers*, or from the Greek *ἡμερῆς*, as some have conjectured) our name of ember days is to be derived. The Saxon *ymbryne* (says Dr. Marshal) signifies a circle, a circuit, or course; and therefore they may be not improperly

Ember days.

(*b*) Now repealed, vide ante.

(*c*) Gibs. p. 252.

(*d*) 3 Inst. p. 200.

called the circular fasts, or fasts in course, being observed in the four seasons on which the circle of the year turns, and accordingly called by the canonists *jejunia quatuor temporum*, or fasts of the four quarters of the year (*e*).

Rogation
days.

Rogations.]—"The three days before the Feast of our Lord's Ascension are called by this name, as being days of special supplication for God's mercy in preserving 'to our use the kindly fruits of the earth,' and in delivering us from the scourges of war, famine and pestilence. The week is called in the Anglo-Saxon *gangweuca*, and the days *gang dægas*; the old form of the name, *gang days*," still lingering in the north of England. * * *

Perambula-
tions.

"The principal ceremony connected with the Rogation days was that of 'Perambulations' or 'Beating the bounds' of parishes, a practice which dates from very ancient times. It was usual to sing the Litany, or a portion of it, with the 103rd and 104th Psalms, in procession. Archbishop Winchelsea's Constitutions, which are enforced by 25 Hen. 8, c. 19, order the parish to provide, at its own charges, 'vexilla pro rogationibus.' The Injunctions of Queen Elizabeth (A.D. 1559) bid the 'curate and the substantial men of the parish walk about the parishes as they are accustomed.' The curate is to admonish the people at different stations, to give thanks to God, and the 103rd Psalm is to be said. There is a homily in three parts for the days of Rogation week, and it appears from various bishops' articles of visitation that it was usual to have the Litany, with one portion of this homily, on each day. There is also, as a sequel to this homily, an 'Exhortation to be spoken to such parishes where they use their perambulations in Rogation week, for the oversight of the bounds and limits of their town' " (*f*).

Declaration
of days to be
observed.

By the rubric after the Nicene Creed: "The curate shall declare unto the people what holy days or fasting days are in the week following to be observed" (*g*).

Canon 64.

By Can. 64 of 1603, "Every parson, vicar or curate shall in his several charge declare to the people every Sunday, at the time appointed in the Communion Book, whether there be any holy-days or fasting days, the week following. And if any do hereafter wittingly offend herein, and being once admonished thereof by his ordinary, shall again omit that duty, let him be censured according to law, until he submit himself to the due performance of it."

Canon 14.

By Can. 14, "The common prayer shall be said or sung, distinctly and reverently, upon such days as are appointed to be kept holy by the Book of Common Prayer, and their eves" (*h*).

(*e*) Gibs. p. 252.

(*g*) Vide supra, p. 790.

(*f*) Blunt, Dictionary of Doctrinal and Historical Theology, pp. 661, 662.

(*h*) Vide supra, p. 762, for this Canon in full.

By the Bank Holidays Act, 1871 (34 & 35 Vict. c. 17), Public holidays. Easter Monday, the Monday in Whitsun week, the first Monday in August and the 26th of December, if a week day, are to be kept as close holidays; and no person shall be compellable to make any payment or do any act on these days, which he would not be compellable to make or do on Christmas-day or Good Friday.

By the Holidays Extension Act, 1875 (38 & 39 Vict. c. 13), the operation of the act is extended from banks to the custom and inland revenue offices, and in certain cases to the docks; and if the 26th of December fall on a Sunday, the 27th is to be a holiday under both acts.

By 41 & 42 Vict. c. 16, s. 22, the occupier of a factory or workshop shall (save as in the act specially excepted) allow to every child, young person, and woman employed the following holidays, that is to say, Christmas-day and Good Friday, or, if he so specifies by public notice, the next holidays under the Holidays Extension Act, 1875 (*i*).

Besides the occasional fast days in time of war or other calamity, and days of thanksgiving for peace, or victory, or other blessing, there were four solemn days annually, for which special services were appointed: to wit, the fifth day of November, being the day of the papists' conspiracy (*k*) and of the arrival of King William; the thirtieth day of January, being the day of the martyrdom of King Charles the First (*l*); the twenty-ninth day of May, being the day of the Restoration of King Charles the Second (*m*); and the day on which the sovereign accedes to the throne. This last is the only one now observed. Days of special services.

The Inauguration day, or the day when the king or queen for the time being began their respective reigns, is not enjoined by act of parliament, as were the other solemn days, for which particular services were appointed. The observation of this day, in the time of King Charles I., was enforced by a particular canon in the year 1640, after the example (as it is said in the preface to that canon) as well of the godly Christian emperors in the former times, as of our own most religious princes since the Reformation; and the said preface further says, that a particular form of prayer was appointed by authority for that day and purpose, and enjoins all churchwardens to provide two of those books at least. This festival was disused in the reign of King Charles II. upon occasion of the death of his royal father, the manner of which changed the day into a day of sorrow and fasting, as is set forth in the order for reviving that usage in the first year of King James II. before the service composed for that purpose. Which service (after another Queen's Inauguration.

(*i*) Vide supra, p. 804.

(*k*) See 3 Jac. 1, c. 1.

(*l*) See 12 Car. 2, c. 30.

(*m*) See 12 Car. 2, c. 14. All these three acts are now repealed by 22 Vict. c. 2.

disuse of that festival during the reign of King William) was revised, and the observation of the day commanded by a special order thereunto annexed, in the second year of Queen Anne, and so continues to this time (*n*).

Authority for
observing.

Some have questioned by what authority of law this solemnity, as also the other occasional thanksgivings and fasts appointed by the king, are kept. Upon which Mr. Johnson observes, that it is sufficient in this case (as he thinks) that the two houses of parliament have and do own this power to be lodged in the crown, as they do by submitting to these royal commands in observing such days, and sometimes petitioning him to order these religious solemnities (*o*).

Johnson's case.

Nevertheless this same Mr. Johnson afterwards, in the year 1715, being cited before the ordinary to give an account why he omitted in his church the service of the king's inauguration, persisted in his omission thereof, and gave this for the reason (which he desired might be understood as well for his omission of the service of that day as of other occasional prayers at other times), namely, that the king's proclamation has not the force of a law in England; that the king is supreme in ecclesiastical causes only as he is so in temporal, that is, in his courts; and that he knows (he says) of no supremacy which is exercised without either parliament or convocation, or court of delegates, or the courts in Westminster Hall; or, however, that the king's supremacy, whatever it is, in this respect is restrained and limited by act of parliament; that by the 36th canon, every clergyman is required to promise, under his hand, that he will use the form in the Book of Common Prayer prescribed, and no other; that by the statute of the 5 & 6 Edw. 6, c. 3, all the days there mentioned shall be kept as holidays, and none other; and that by the several acts of uniformity, all ministers are required to use the form prescribed in the Book of Common Prayer, and none other or otherwise. And the prosecution against him (he says) did not proceed (*p*). This was in the year 1721, after the cause had rested for six years. But whether it was upon the occasion of Mr. Johnson's publishing this case, or for whatever other reason, it appears that the prosecution did afterwards proceed. And in Archbishop Wake's Collectanea, now belonging to the library of Christ Church in Oxford (*q*), there is a letter from Dr. Bower, Archdeacon of Canterbury (who was then also Bishop of Chichester), to Archbishop Wake, proposing methods of bringing Mr. Johnson's cause to speedy issue; dated Oct. 26th, 1723.

Then follows a copy of Mr. Johnson's proxy, viz. :—

Whereas there has been a cause of office, &c. And whereas divers articles have been given in and admitted, to which the

(*n*) Gibs. p. 246.

(*o*) Johns. vol. ii. pp. 198, 199.

(*p*) Johnson, Case of occasional

Days and Prayers.

(*q*) Wake, Collectanea—Canterbury, v. 4, art. 276.

said Johnson had given a negative office, as by the act, &c. Now know all men by these presents, that I the said J. J. do acknowledge and confess myself sorry for having given offence in the matters contained in the said articles, and do hereby retract the negative issue given by me to them, and do confess the said articles in all and every part thereof, and submit myself in all things to the right reverend the archdeacon aforesaid, or his official; and do hereby sincerely promise not to offend in the like manner for the future; and being aged and infirm, and very unfit to travel from my said vicarage to Canterbury, but desirous that this my retraction of the negative issue given by me to the said articles, and my promise not to offend in the like manner for the future, may have their due effect, I do hereby constitute and appoint Mr. George Upton, one of the proctors of the said archdeacon's court, to be my lawful and undoubted proctor for me and in my name, to appear before the right reverend the archdeacon aforesaid, or his official or surrogate, or any other competent judge in this behalf, to pray and procure this my retraction of the negative issue given by me to the said articles to be admitted, and to confess the same in all their parts, with a promise in my name not to offend in the like manner for the future; and submitting in all things to what the right reverend the archdeacon or his official shall do touching the premises; ratifying, allowing, and hereby confirming whatsoever my said proctor shall fully do or cause to be done herein. In witness whereof I have hereunto set my hand and seal, this third day of March, 1723 (*r*).

JOHN JOHNSON.

Then follows,

6^{to} Martii 1723 coram D^{no} Wise, &c.

Procuēs hinc inde consenserunt in diem, &c. Tunc Upton exī proeuŕum suum spiale sub manu et sigillo J. J. Clici partis suæ firmatum et vigore ejusdem retractavit responsa sua negativa aliis artis cō eundem J. J. exīs facta et data et animo contestandi litem affirmative et eosdem agnovit omnes et singulos artos præd in omni parte eorundem esse veros et nomine partis suæ submitit se Rdo Dño Epō Cicestŕ Archiōno Cant ejusq; officiali cum promissione de non repetendo offensiones in articulis præd objectas et homoi proeuŕium retractiōnem confessiōn submissioni et promissioni admisit Quātus, &c. in præsentia Norris eadem confessa oblata et acta per Upton acceptantis. Tunc dtus Upton petiit dtum J. J. partem suam dimitti dto Norris dissen ad ejus petnem D^{nus} decrevit mōnem contra dtum J. J. ad legend et recitand in ecclia sua pafoali de Cranbrook formulas precum publicæ 29 Maii 1^o Augusti 5^{to} Novembris et 30 vel 31 Jañ legi et recitari autoritate regia injunctas diebus respve præd et ad certificand D^{no} Archiōno præd ejusve officiali aut alii judici in hac parte competenti de obedientia sua in hac parte

(*r*) Wake, Collectanea—Canterbury, v. 4, art. 277.

facta primo die juridico post 30^m Januarii pro^x futu^r et condemnavit dtum J. J. in expensis, &c. et assignavit procuribus hinc inde ad audien^t voltem, &c. super peⁿem dⁱ Upton et super taxation^e earundem expensarum in prox^m, &c. d^{to} Upton disseñ.

Art. 292. Extract from a letter to Archbishop Wake, in Mr. Johnson's own handwriting.

Cranbrook, Lady-day, 1724.

May it please your Grace,

To accept of my most humble thanks for your lenity, in the point of extraordinary days and occasional prayers. And I promise that I will never give you just occasion to repent of it.

CHAPTER XIII.

THE CORONATION SERVICE.

THE
FORM AND ORDER *(a)*
OF THE
SERVICE THAT IS TO BE PERFORMED, AND OF THE
CEREMONIES THAT ARE TO BE OBSERVED
IN
The Coronation
OF
HER MAJESTY
QUEEN VICTORIA,
IN THE
ABBAY CHURCH OF ST. PETER, WESTMINSTER,
ON THURSDAY, THE 28TH OF JUNE, 1838 *(b)*.

THE CONTENTS OF THIS BOOK.

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| I. The Entrance into the Church. | X. The Investing with the Royal Robe and the Delivery of the Orb. |
| II. The Recognition. | XI. The Investiture per Annulum & Baculum. |
| III. The First Oblation. | XII. The Putting on of the Crown. |
| IV. The Litany. | XIII. The Presenting of the Holy Bible. |
| V. The beginning of the Communion Service. | XIV. The Benediction and Te Deum. |
| VI. The Sermon. | XV. The Inthronization. |
| VII. The Oath. | XVI. The Homage. |
| VIII. The Anointing. | XVII. The Communion. |
| IX. The Presenting of the Spurs and Sword, and the Oblation of the said Sword. | XVIII. The Final Prayers. |
| | XIX. The Recess. |
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(a) So few copies of this service were published, that I have thought it desirable to print it here at some length.

(b) As to earlier coronations, see note at end of Chapter; and see Taylor on Coronations (The Glory of Regality), 1820; Chapters on Coronation, 1838; Historical ac-

count of Ancient and Modern Coronations, by Banks, 1820; Royal Records, by Planché. All these are in the Library of Lincoln's Inn. See also Engeland Beroerd, a Dutch account of the Coronation of William III., in the possession of H. H. Gibbs, Esq.

THE FORM AND ORDER OF HER MAJESTY'S CORONATION.

In the Morning upon the Day of the Coronation early, Care is to be taken that the Ampulla be filled with Oil, and, together with the Spoon, be laid ready upon the Altar in the Abbey-Church.

SECT. I.

THE ENTRANCE INTO THE CHURCH.

The Queen, as soon as She enters at the West Door of the Church, is to be received with the following Anthem, to be sung by the Choir.

ANTHEM.

I was glad when they said unto me : We will go into the house of the Lord.

For there is the seat of judgment : even the seat of the house of David.
O pray for the peace of Jerusalem : they shall prosper that love thee.

Peace be within thy walls : and prosperity within thy palaces.

Glory be to the Father, and to the Son, and to the Holy Ghost ;

As it was in the beginning, is now, and ever shall be : world without end. Amen.

The Queen in the mean time passes up through the Body of the Church, into, and through the Choir, and so up the Stairs to the Theatre ; and having passed by Her Throne, She makes Her humble Adoration, and then kneeling at the Faldstool set for Her before Her Chair, uses some short private Prayers ; and, after sitting down (not in Her Throne, but in Her Chair before and below Her Throne), there reposes Herself.

SECT. II.

THE RECOGNITION.

The Queen being so placed, the Archbishop turneth to the East part of the Theatre, and after, together with the Lord Chancellor, Lord Great Chamberlain, Lord High Constable and Earl Marshal (Garter King of Arms preceding them), goes to the other three sides of the Theatre in this order, South, West, and North, and at every of the four sides, with a loud Voice, speaks to the People : and the Queen in the mean time standing up by Her Chair, turns and shows Herself unto the People at every of the four sides of the Theatre, as the Archbishop is at every of them, and while he speaks thus to the People :

Sirs, I here present unto you Queen Victoria, the Undoubted Queen of this Realm : Wherefore All you who are come this Day to do your Homage, Are you willing to do the same ?

The People signify their Willingness and Joy, by loud and repeated Acclamations, all with one voice crying out,

GOD save Queen Victoria (a).

Then the Trumpets sound.

(a) The people are for this purpose represented by the boys of Westminster School.—Anson, "The Law and Custom of the Constitution," Part II., p. 65.

SECT. III.

THE FIRST OBLATION.

The Bible, Paten and Cup being brought by the Bishops who had borne them and placed upon the Altar, the Archbishop goeth to the Altar and puts on his Cope, and standeth on the North Side of it: And the Bishops who are to read the Litany, do also vest themselves. And the Officers of the Wardrobe, &c. spread Carpets and Cushions on the Floor and Steps of the Altar.

Which being done, the Queen, supported by the two Bishops of Durham and Bath and Wells, and attended by the Dean of Westminster, the Great Officers and the Lords that carry the Regalia going before Her, goes down to the Altar, and kneeling upon the Steps of it makes Her First Oblation; which is a Pall or Altar-Cloth of Gold, delivered by an Officer of the Wardrobe to the Lord Great Chamberlain, and by him, kneeling, to Her Majesty: and an Ingot or Wedge of Gold of a pound weight, which the Treasurer of the Household delivers to the Lord Great Chamberlain, and he to Her Majesty, kneeling: Who delivers them to the Archbishop, and the Archbishop standing (in which posture he is to receive all other Oblations) receives from Her, one after another, the Pall to be reverently laid upon the Altar, and the Gold to be received into the Bason, and with the like Reverence put upon the Altar.

First Oblation, a Pall and Wedge of Gold.

Then the Archbishop saith this Prayer, the Queen still kneeling:

O GOD, who dwellest in the high and holy Place, with them also who are of an humble Spirit, Look down mercifully upon this Thy Servant Victoria our Queen, here humbling Herself before Thee at Thy Footstool, and graciously receive these Oblations, which in humble Acknowledgment of Thy Sovereignty over all, and of Thy great Bounty to Her in particular, She hath now offered up unto Thee, through Jesus Christ our only Mediator and Advocate. Amen.

The Queen having thus offered, and so fulfilled his Commandment, who said, Thou shalt not appear before the Lord thy GOD empty; goes to Her Chair set for Her on the South side of the Altar, when She is to kneel at Her Faldstool when the Litany begins.

In the mean time, the Lords who carry the Regalia, except those who carry the Swords, come in order near to the Altar, and present Every One what He carries to the Archbishop, who delivers them to the Dean of Westminster, to be by Him placed upon the Altar, and then retire to the Places and Seats appointed for them.

SECT. IV.

THE LITANY.

Then followeth the Litany, to be read by two Bishops, vested in Copes, and kneeling at a Faldstool above the Steps of the Theatre, on the middle of the East side thereof, the Choir reading the Responses.

[After the Prayer "We humbly beseech thee, O Father, &c., the following prayer is inserted:]

O GOD, who providest for Thy people by Thy power, and rulest over them in love, grant unto this Thy servant our Queen the spirit of wisdom and government, that being devoted unto Thee with all Her heart, She may so wisely govern this kingdom, that in Her time Thy Church and people may continue in safety and prosperity; and that persevering in good works unto the end She may through Thy mercy come to Thine everlasting kingdom, through Jesus Christ Thy Son our Lord. Amen.

The Grace of our Lord Jesus Christ, and the Love of God, and the Fellowship of the Holy Ghost, be with us all evermore. Amen.

The Bishops who read the Litany will resume their Seats.



SECT. V.

THE BEGINNING OF THE COMMUNION SERVICE.

Sanctus.

Holy! Holy! Holy, Lord God of Hosts;
Heaven and Earth are full of Thy Glory;
Glory be to Thee, O Lord most High;
Amen.

Then the Archbishop beginneth the Communion Service.



The Epistle,

To be read by one of the Bishops.

1 Pet. ii. 13.



The Gospel,

To be read by another Bishop, the Queen with the People standing.

S. Matth. xxii. 15.



Then the Archbishop readeth the Nicene Creed; the Queen with the People standing as before.

The Service being concluded, the Bishops who assisted will return to their Seats.



SECT. VI.

THE SERMON.

At the end of the Creed one of the Bishops is ready in the Pulpit, placed against the Pillar at the North-East Corner of the Theatre, and begins the Sermon, which is to be suitable to the great Occasion; which the Queen hears sitting in Her Chair on the South side of the Altar, over against the Pulpit.

On her right hand stands the Bishop of Durham, and beyond him, on the same side, the Lords that carry the Swords: On her left hand the Bishop of Bath and Wells, and the Lord Great Chamberlain.

On the North side of the Altar sits the Archbishop in a purple velvet Chair: near the Archbishop stands Garter King of Arms: on the South side, East of the Queen's Chair nearer to the Altar, stand the Dean and Prebendaries of Westminster.



SECT. VII.

THE OATH.

The Sermon being ended, and Her Majesty having on Monday, the 20th Day of November, 1837, in the presence of the Two Houses of Parliament made and signed the Declaration, the Archbishop goeth to the Queen, and standing before Her, says to the Queen,

Madam,

Is Your Majesty willing to take the Oath?

And the Queen answering,

I am willing.

The Archbishop ministereth these questions; and the Queen, having a copy of the printed Form and Order of the Coronation Service in Her Hands, answers each Question severally as follows:

Archb.—Will you solemnly promise and swear to govern the People of this United Kingdom of *Great Britain and Ireland*, and the Dominions thereto belonging, according to the Statutes in Parliament agreed on, and the respective Laws and Customs of the same?

Queen.—I solemnly promise so to do.

Archb.—Will you to your power cause Law and Justice, in Mercy, to be executed in all your Judgments?

Queen.—I will.

Archb.—Will you to the utmost of your Power maintain the Laws of GOD, the true Profession of the Gospel, and the Protestant Reformed Religion established by Law? And will you maintain and preserve inviolably the Settlement of the United Church of *England and Ireland*, and the Doctrine, Worship, Discipline, and Government thereof, as by Law established within *England and Ireland* and the Territories thereunto belonging? And will you preserve unto the Bishops and Clergy of *England and Ireland*, and to the Churches there committed to their Charge, all such Rights and Privileges, as by Law do, or shall appertain to them, or any of Them?

Queen.—All this I promise to do.

Then the Queen arising out of Her Chair, attended by Her supporters, and assisted by the Lord Great Chamberlain, the Sword of State being carried before Her, shall go to the altar, and there make Her Solemn Oath in the sight of all the People, to observe the Premises: Laying Her right hand upon the Holy Gospel in the Great Bible, which was before carried in the Procession, and is now brought from the altar by the Archbishop, and tendered to Her as She kneels upon the steps, saying these words:

The Bible to be brought.

The things which I have here before promised, I will perform, and keep.

So help me GOD.

Then the Queen kisseth the Book, and signeth the Oath.

And a Silver Standish.

SECT. VIII.

THE ANOINTING.

The Queen having thus taken Her Oath, returns again to Her Chair on the South Side of the Altar; and kneeling at Her Faldstool, the Archbishop beginneth the Hymn, Veni Creator Spiritus, and the Choir singeth it out.

This being ended, the Archbishop saith this Prayer:

O Lord, Holy Father, who by anointing with Oil didst of old make and consecrate Kings, Priests, and Prophets to teach and govern thy people

Here the
Archbishop
lays his hand
upon the
Ampulla.

Israel: Bless and Sanctify thy Chosen Servant Victoria, who by our Office and Ministry is now to be anointed with this Oil, and consecrated Queen of this Realm: Strengthen Her, O Lord, with the Holy Ghost the Comforter; Confirm and Stablish Her with thy free and Princely Spirit, the Spirit of Wisdom and Government, the Spirit of Counsel and Ghostly Strength, the Spirit of Knowledge and true Godliness, and fill Her, O Lord, with the Spirit of thy Holy Fear, now and for ever. Amen.

This Prayer being ended, the Choir sings:

Anthem.

1 Kings, i.
39, 40.

Zadok the Priest, and Nathan the Prophet, anointed Solomon King; and all the people rejoiced, and said, GOD save the King, Long live the King. May the King live for ever. Amen. Hallelujah.

At the commencement of the Anthem, the Queen rising from her Devotions, goes before the Altar, attended by Her Supporters, and assisted by the Lord Great Chamberlain, the Sword of State being carried before Her, where Her Majesty is disrobed of Her Crimson Robes.

The Queen will then sit down in King Edward's Chair placed in the midst of the Area over against the Altar, with a Faldstool before it, wherein She is to be Anointed. Four Knights of the Garter hold over her a rich Pall of Silk or Cloth of Gold; the Anthem being concluded, the Dean of Westminster taking the Ampulla and Spoon from off the Altar, holdeth them ready, pouring some of the Holy Oil into the Spoon, and with it the Archbishop anointeth the Queen, in the Form of a Cross.

On the Crown of the Head, and on the Palms of both the Hands, saying,

Be Thou anointed with Holy Oil, as Kings, Priests, and Prophets were anointed:

And as Solomon was anointed King by Zadok the Priest, and Nathan the Prophet, so be you anointed, blessed, and consecrated Queen over this people, whom the Lord your GOD hath given you to rule and govern. In the Name of the Father, and of the Son, and of the Holy Ghost. Amen.

Then the Dean of Westminster layeth the Ampulla and Spoon upon the Altar, and the Queen kneeleth down at the Faldstool and the Archbishop standing on the North side of the Altar, saith this Prayer or Blessing over Her:

Our Lord Jesus Christ, the Son of GOD, who by His Father was anointed with the Oil of gladness above his fellows, by his Holy Anointing pour down upon your Head and Heart the Blessing of the Holy Ghost, and prosper the Works of your Hands: that by the Assistance of his Heavenly Grace you may preserve the People committed to your charge in Wealth, Peace, and Godliness; and after a long and glorious Course of ruling this Temporal Kingdom Wisely, Justly, and Religiously, you may at last be made Partaker of an Eternal Kingdom, through the Merits of Jesus Christ our Lord. Amen.

This Prayer being ended, the Queen arises, and sits down again in Her Chair.



SECT. IX.

THE PRESENTING OF THE SPURS AND SWORD, AND THE OBLATION OF THE SAID SWORD.

The Spurs.

The Spurs are brought from the Altar by the Dean of Westminster, and delivered to the Lord Great Chamberlain, who kneeling down, presents them to the Queen, who forthwith sends them back to the Altar.

The Sword
of State
returned.

Then the Lord who carries the Sword of State returns the said Sword to the Lord Chamberlain (who gives it to an Officer of the Jewel House, to be

deposited in the Traverse in King Edward's Chapel) and receiveth in lieu thereof, from the Lord Chamberlain, another Sword in a Scabbard of Purple Velvet, which he will deliver to the Archbishop, who laying it on the Altar, saith the following Prayer :

Another
Sword
brought.

Hear our prayers, O Lord, we beseech thee, and so direct and support thy Servant Queen Victoria, that She may not bear the Sword in vain; but may use it as the Minister of God for the terror and punishment of Evil-doers, and for the protection and encouragement of those that do well, through Jesus Christ our Lord. Amen.

Then the Archbishop takes the Sword from off the Altar, and (the Archbishops of York and Armagh, and the Bishops of London and Winchester, and other Bishops assisting and going along with him) delivers it into the Queen's Right Hand, and She holding it, the Archbishop saith :

Delivered to
the Queen.

Receive this Kingly Sword, brought now from the Altar of God, and delivered to you by the hands of us the Bishops and Servants of God, though Unworthy. With this Sword do Justice, stop the Growth of Iniquity, protect the holy Church of God, help and defend Widows and Orphans, restore the things that are gone to decay, maintain the things that are restored, punish and reform what is amiss, and confirm what is in good order : that doing these things, you may be glorious in all virtue; and so faithfully serve our Lord Jesus Christ in this life, that you may reign for ever with Him in the Life which is to come. Amen.

Then the Queen rising up, and going to the Altar, offers the Sword there in the Scabbard delivering it to the Archbishop, who places it on the Altar; the Queen then returns and sits down in King Edward's Chair; and the Lord who first received the Sword offereth the Price of it, and having thus redeemed it, receiveth it from off the Altar by the Dean of Westminster, and draweth it out of the Scabbard and carries it naked before Her Majesty during the rest of the solemnity.

Offered and
redeemed.

The Archbishops and Bishops who had assisted during this Oblation will return to their Places.



SECT. X.

THE INVESTING WITH THE ROYAL ROBE, AND THE DELIVERY OF THE ORB.

Then the Queen arising, the Imperial Mantle, or Dalmatic Robe, of Cloth of Gold, lined or furred with Ermins, is by an Officer of the Wardrobe delivered to the Dean of Westminster, and by him put upon the Queen standing; The Queen having received it, sits down, and then the Orb with the Cross is brought from the Altar by the Dean of Westminster, and delivered into the Queen's Right Hand by the Archbishop, pronouncing this Blessing and Exhortation :

The Royal
Robe.

The Orb.

Receive this Imperial Robe, and Orb, and the Lord your GOD endue you with Knowledge, and Wisdom, with Majesty and with Power from on High; the Lord clothe you with the Robe of Righteousness, and with the Garments of Salvation. And when you see this Orb set under the Cross, remember that the whole World is subject to the Power and Empire of Christ our Redeemer. For He is the Prince of the Kings of the Earth; King of Kings, and Lord of Lords: So that no man can reign happily, who derives not his Authority from Him, and directs not all his Actions according to His Laws.

The Queen delivers Her Orb to the Dean of Westminster, to be by him laid on the Altar.



SECT. XI.

THE INVESTITURE PER ANNULUM & BACULUM.

The Ring.

Then an Officer of the Jewel House delivers to the Lord Chamberlain the Queen's Ring, who delivers the same to the Archbishop, in which a Table Jewel is encased; the Archbishop puts it on the Fourth Finger of Her Majesty's Right Hand, and saith;

Receive this Ring, the Ensign of Kingly Dignity, and of Defence of the Catholic Faith; and as you are this day solemnly invested in the Government of this earthly kingdom, so may you be sealed with that Spirit of Promise, which is the Earnest of an heavenly Inheritance, and reign with Him who is the blessed and only Potentate, to whom be Glory for ever and ever. Amen.

Then the Dean of Westminster brings the Sceptre and Rod to the Archbishop; and the Lord of the Manour of Worksop (who claims to hold an Estate by the Service of presenting to the Queen a Right Hand Glove on the Day of Her Coronation, and supporting the Queen's Right Arm whilst She holds the Sceptre with the Cross) delivers to the Queen a Pair of rich Gloves, and upon any Occasion happening afterwards, supports Her Majesty's Right Arm, or holds Her Sceptre by Her.

The Gloves.

The Gloves being put on, the Archbishop delivers the Sceptre, with the Cross, into the Queen's Right Hand, saying,

Receive the Royal Sceptre, the Ensign of Kingly Power and Justice.

And then he delivers the Rod with the Dove, into the Queen's Left Hand, and saith,

Receive the Rod of Equity and Mercy: and God, from whom all holy desires, all good counsels, and all just works do proceed, direct and assist you in the Administration and Exercise of all those Powers which He hath given you. Be so merciful that you be not too remiss, so execute Justice, that you forget not Mercy. Judge with Righteousness, and reprove with Equity, and accept no Man's Person. Abase the Proud, and lift up the Lowly; punish the Wicked, protect and cherish the Just, and lead your People in the way wherein they should go: thus in all things following His great and holy Example, of whom the Prophet David said, "Thou lovest Righteousness, and hatest Iniquity; The Sceptre of Thy Kingdom is a right Sceptre;" even Jesus Christ our Lord. Amen.



SECT. XII.

THE PUTTING ON OF THE CROWN.

K. Edward's Crown.

The Archbishop standing before the Altar, taketh the Crown into his Hands, and laying it again before him upon the Altar, saith;

Here the Queen must be put in mind to bow her Head.

O God, who crownest thy faithful Servants with Mercy and loving Kindness; Look down upon this thy Servant Victoria our Queen, who now in lowly Devotion boweth Her Head to thy Divine Majesty; and as thou dost this day set a Crown of pure Gold upon Her Head, so enrich Her Royal Heart with thy heavenly Grace; and crown Her with all Princely Virtues which may adorn the high station wherein thou hast placed Her, through Jesus Christ our Lord, to whom be Honour and Glory for ever and ever. Amen.

The Queen crowned.

Then the Queen still sitting in King Edward's Chair the Archbishop, assisted with the same Archbishops and Bishops as before, comes from the Altar; the Dean of Westminster brings the Crown, and the Archbishop taking it of him, reverently putteth it upon the Queen's Head. At the sight

whereof the People with loud and repeated shouts cry, GOD save the Queen, and the Trumpets sound, and by a signal given, the great Guns at the Tower are shot off. As soon as the Queen is crowned, the Peers, &c., put on their Coronets and Caps.

The acclamation ceasing, the Archbishop goeth on, and saith,

Be strong and of a good Courage : Observe the Commandments of GOD, and walk in His Holy ways : Fight the good Fight of Faith, and lay hold on Eternal Life ; that in this World You may be crowned with Success and Honour, and when You have finished Your Course, receive a Crown of Righteousness, which GOD the Righteous Judge shall give You in that Day. Amen.

Then the Choir singeth this Anthem :

ANTHEM.

The Queen shall rejoice in Thy Strength, O Lord : exceeding glad shall She be of Thy Salvation. Thou hast prevented Her with the Blessings of Goodness, and hast set a Crown of pure Gold upon Her Head. Hallelujah. Amen.

SECT. XIII.

THE PRESENTING OF THE HOLY BIBLE.

Then shall the Dean of Westminster take the Holy Bible, which was carried in the Procession, from off the Altar, and deliver it to the Archbishop, who with the same Archbishops and Bishops as before going along with him, shall present it to the Queen, first saying these words to Her : The Bible.

Our Gracious Queen ; we Present You with this Book, the most valuable thing that this World affords. Here is Wisdom ; This is the Royal Law ; These are the lively Oracles of GOD. Blessed is he that readeth, and they that hear the words of this Book ; that keep and do the things contained in it. For these are the Words of Eternal Life, able to make you wise and happy in this World, nay wise unto Salvation, and so happy for evermore, through Faith which is in Christ Jesus, to whom be Glory for ever. Amen.

Then the Queen delivers back the Bible to the Archbishop, who gives it to the Dean of Westminster, to be reverently placed upon the Holy Altar, the Archbishops and Bishops who had assisted returning to their Seats.

SECT. XIV.

THE BENEDICTION AND TE DEUM.

And now the Queen having been thus anointed and crowned, and having received all the Ensigns of Royalty, the Archbishop solemnly blesseth Her : and all the Bishops, with the rest of the Peers, follow every part of the Benediction, with a loud and hearty Amen.

The Lord bless and keep you : The Lord make the light of his Countenance to shine for ever upon you, and be gracious unto you : The Lord protect you in all your ways, preserve you from every evil thing, and prosper you in everything good. Amen.

The Lord give you a faithful Senate, wise and upright Counsellors and Magistrates, a loyal Nobility, and a dutiful Gentry ; a pious and learned and useful Clergy ; an honest, industrious, and obedient Commonalty. Amen.

THE CHURCH IN HER RELATION TO HER MEMBERS.

In your days may Mercy and Truth meet together, and Righteousness and Peace kiss each other; May Wisdom and Knowledge be the Stability of your Times, and the Fear of the Lord your Treasure. Amen.

The Lord make your Days many, your Reign prosperous, your Fleets and Armies victorious: and may you be revered and beloved by all your Subjects, and ever increase in Favour with God and Man. Amen.

The glorious Majesty of the Lord our God be upon you: may He bless you with all temporal and spiritual Happiness in this World, and crown you with Glory and Immortality in the World to come. Amen.

Then the Archbishop turneth to the People, and saith:

And the same Lord GOD Almighty grant, that the Clergy and Nobles assembled here for this great and solemn Service, and together with them all the People of the Land, fearing God, and honouring the Queen, may by the merciful Superintendency of the Divine Providence, and the vigilant Care of our gracious Sovereign, continually enjoy Peace, Plenty, and Prosperity, through Jesus Christ our Lord, to whom, with the Eternal Father, and God the Holy Ghost, be Glory in the Church, world without end. Amen.

Te Deum.

Then the Choir begins to sing the Te Deum, and the Queen goes to the Chair on which Her Majesty first sate on the East Side of the Throne, the Two Bishops Her Supporters, the Great Officers, and other Peers, attending Her, every one in his place, the two Swords being carried before Her, and there reposes Herself.

Here followeth the Te Deum.

SECT. XV.

THE INTHRONIZATION.

The Te Deum being ended, the Queen will ascend the Theatre, and be lifted up into Her Throne by the Archbishop and Bishops, and other Peers of the Kingdom, and being Inthronized, or placed therein, all the Great Officers, Those that bear the Swords and the Sceptres, and the rest of the Nobles, stand round about the steps of the Throne, and the Archbishop standing before the Queen, saith:

Stand firm, and hold fast from henceforth the Seat and State of Royal and Imperial Dignity, which is this day delivered unto you in the Name and by the Authority of Almighty God, and by the Hands of Us the Bishops and Servants of GOD, though unworthy: And as you see Us to approach nearer to God's Altar, so vouchsafe the more graciously to continue to us your Royal Favour and Protection. And the Lord GOD Almighty, whose Ministers we are, and the Stewards of His Mysteries, establish your Throne in Righteousness, that it may stand fast for evermore, like as the Sun before Him, and as the faithful Witness in Heaven. Amen.

SECT. XVI.

THE HOMAGE.

The Homage.

The Exhortation being ended, all the Peers then present do their homage publicly and solemnly unto the Queen upon the Theatre, and in the mean time the Treasurer of the Household throws among the People Medals of Gold and Silver, as the Queen's Princely Largess or Donative.

The Archbishop first kneels down before Her Majesty's knees, and the rest of the Bishops kneel on either Hand, and about him; and they do their Homage together, for the shortening of the Ceremony, the Archbishop saying : Of the Bishops.

I William, Archbishop of Canterbury [and so every one of the rest, I N., Bishop of N., repeating the rest audibly after the Archbishop], will be faithful and true, and Faith and Truth will bear, unto you our Sovereign Lady, and your Heirs, Kings or Queens of the United Kingdom of Great Britain and Ireland. And I will do, and truly acknowledge, the Service of the Lands which I claim to hold of you, as in right of the Church. So help me God.

Then the Archbishop kisseth the Queen's Hand, and so the rest of the Bishops present after him.

After which the other Peers of the Realm do their Homage in like manner, the Dukes first by themselves, and so the Marquesses, the Earls, the Viscounts, and the Barons, severally; the first of each order kneeling before Her Majesty, and the rest with and about him, all putting off their Coronets, and the first of each class beginning, and the rest saying after him : Of the other Peers.

I N. Duke, or Earl &c. of N. do become your Liege man of Life and Limb, and of earthly worship, and Faith and Truth I will bear unto you to live and die against all manner of Folks.

So help me God.

NOTE.—That Copies of THIS Homage must be provided by the Heralds for every Class of the Nobility.

The Peers having done their Homage, stand all together round about the Queen; and each Class or Degree going by themselves, or (as it was at the Coronation of King Charles the First and Second) every Peer one by one in order, putting off their Coronets, singly ascend the Throne again, and stretching forth their hands do touch the Crown on Her Majesty's Head, as promising by that Ceremony to be ever ready to support it with all their power, and then every one of them kisseth the Queen's Hand.

While the Peers are thus doing their Homage, and the Medals thrown about, the Queen, if She thinks good, delivers Her Sceptre with the Cross to the Lord of the Manour of Worksop to hold; and the other Sceptre or Rod, with the Dove, to the Lord that carried it in the procession.

And the Bishops that support the Queen in the Procession may also ease Her by supporting the Crown, as there shall be occasion.

During the performance of the Homage the Choir sing this

ANTHEM.

This is the day which the Lord hath made, we will rejoice and be glad in it.

Lord, grant the Queen a long life: that her years may endure throughout all generations.

She shall dwell before God for ever: O prepare thy loving mercy and faithfulness, that they may preserve her.

Blessed be the Lord thy God, who delighted in Thee to set Thee on the Throne.

When the Homage is ended, the Drums beat, and the Trumpets sound, and all the People shout, crying out,

GOD save Queen Victoria.

Long live Queen Victoria.

May the Queen live for ever.

The solemnity of the Coronation being thus ended, the Archbishop leaves the Queen in Her Throne, and goes down to the altar.

SECT. XVII.

THE COMMUNION.

The Offer-
tory.

Then the Offertory begins, the Archbishop reading these Sentences :

Let your light so shine before men, that they may see your good works, and glorify your Father which is in Heaven.

Charge them who are rich in this world, that they be ready to give, and glad to distribute; laying up in store for themselves a good foundation against the time to come, that they may attain eternal life.

The Queen
offers Bread
and Wine.

The Queen descends from Her Throne, attended by Her Supporters, and assisted by the Lord Great Chamberlain, the Sword of State being carried before Her, and goes to the Steps of the Altar, where taking off Her Crown, which she delivers to the Lord Great Chamberlain to hold, She kneels down. And first the Queen offers Bread and Wine for the Communion, which being brought out of King Edward's Chapel, and delivered into Her Hands, the Bread upon the Paten by the Bishop that read the Epistle, and the Wine in the Chalice by the Bishop that read the Gospel, are by the Archbishop received from the Queen, and reverently placed upon the Altar, and decently covered with a fair linen Cloth, the Archbishop first saying this Prayer :

Bless, O Lord, we beseech thee, these thy Gifts, and sanctify them unto this holy use, that by them we may be made partakers of the Body and Blood of thine only begotten Son Jesus Christ, and fed unto everlasting life of Soul and Body: And that thy Servant Queen Victoria may be enabled to the discharge of her weighty Office, whereunto of thy great goodness thou hast called and appointed Her. Grant this, O Lord, for Jesus Christ's sake, our only Mediator and Advocate. Amen.

Then the Queen kneeling, as before, makes Her Second Oblation, a Purse of Gold, which the Treasurer of the Household delivers to the Lord Great Chamberlain, and he to Her Majesty. And the Archbishop coming to Her, receives it into the Bason, and places it upon the Altar.

After which the Archbishop says,

O GOD, who dwellest in the high and holy place, with them also who are of an humble spirit; Look down mercifully upon this thy Servant Victoria our Queen, here humbling herself before Thee at thy Footstool; and graciously receive these Oblations, which in humble acknowledgment of thy Sovereignty over all, and of thy great Bounty to Her in particular, She has now offered up unto Thee, through Jesus Christ, our only Mediator and Advocate. Amen.

Then the Queen goes to Her Chair on the South Side of the Altar and kneeling down at Her Faldstool, the Archbishop saith :

Let us pray for the whole state of Christ's Church militant here in earth.

[Here follows the Communion Office; and the Archbishop uses the following Proper Preface for the Occasion:]

It is very meet, right, and our bounden duty, that we should at all times, and in all places, give thanks unto thee, O Lord, holy Father, Almighty, Everlasting GOD:

Who hast at this time given us thy Servant our Sovereign Queen Victoria to be the Defender of thy Faith, and the Protector of thy People; that under Her we may lead a quiet peaceable life in all Godliness and Honesty.

Therefore, &c.

The Queen
communi-
cates.

When the Archbishop and Dean of Westminster, with the Bishops Assistants, namely, the Preacher, and those who read the Litany and the Epistle and Gospel, have communicated in both kinds, the Queen advances

to the Altar and kneels down, and the Archbishop shall administer the Bread and the Dean of Westminster the Cup, to Her.

[After the Queen has communicated, the next Rubric is as follows:]

The Queen then puts on Her Crown, and taking the Sceptre in Her Hands again, repairs to Her Throne.

Then the Archbishop goeth on to the Post Communion.

[After the Gloria in Excelsis the Choir sing the following Anthem:]

Post Com-
munion.

ANTHEM.

Hallelujah: For the Lord GOD Omnipotent reigneth. The kingdom of this World is become the kingdom of our Lord, and of his Christ. And He shall reign for ever and ever, King of Kings, and Lord of Lords. Hallelujah.

After the Anthem the Archbishop reads the final Prayers.

SECT. XVIII.

THE FINAL PRAYERS.

Assist us mercifully, O Lord, in these our supplications and prayers, and dispose the way of thy servants towards the attainment of everlasting salvation; that, among all the changes and chances of this mortal life, they may ever be defended by thy most gracious and ready help; through Jesus Christ our Lord. Amen.

O Lord our God, who upholdest and governest all things in Heaven and Earth; Receive our humble prayers, with our thanksgivings, for our Sovereign Lady Victoria, set over us by thy good providence to be our Queen: And so together with her bless Adelaide the Queen Dowager, and the rest of the Royal Family, that they ever trusting in thy goodness, protected by thy power, and crowned with thy favour, may continue before thee in health and peace, in joy and honour, a long and happy life upon earth, and after death may obtain everlasting life and glory in the kingdom of Heaven, through the merits and mediation of Jesus Christ our Saviour; who with thee, O Father, and the Holy Spirit, liveth and reigneth ever one GOD, world without end. Amen.

Almighty GOD, who hast promised to hear the petitions of them that ask in thy Son's Name; We beseech thee mercifully to incline thine ears to us that have made now our prayers and supplications unto thee; and grant, that those things, which we have faithfully asked according to thy will, may effectually be obtained, to the relief of our necessity, and to the setting forth of thy glory; through Jesus Christ our Lord. Amen.

The peace of GOD, which passeth all understanding, keep your hearts and minds in the knowledge and love of GOD, and of his Son Jesus Christ our Lord: and the blessing of GOD Almighty, the Father, the Son, and the Holy Ghost, be amongst you and remain with you always. Amen.

SECT. XIX.

THE RECESS.

The whole Coronation Office being thus performed, the Queen attended and accompanied as before, the four Swords being carried before Her, descends from Her Throne crowned, and carrying Her Sceptre and Rod in Her Hands, goes into the Area Eastward of the Theatre, and passes on through the Door on the South side of the Altar into King Edward's Chapel; and as

The Proceed-
ing into King
Edward's
Chapel:
Of the Queen.

she passes by the Altar, the rest of the Regalia, lying upon it, are to be delivered by the Dean of Westminster to the Lords that carried them in the Procession, and so they proceed in State into the Chapel, the organ and other instruments all the while playing.

The Queen being come into the Chapel, and standing before the Altar, will deliver the Sceptre with the Dove to the Archbishop, who will lay it upon the Altar there. The Queen will then be disrobed of Her Imperial Mantle, and arrayed in Her Royal Robe of Purple Velvet by the Lord Great Chamberlain.

The Archbishop, being still vested in his Cope, will then place the Orb in Her Majesty's Left Hand. And the Gold Spurs and King Edward's Staff are given into the hands of the Dean of Westminster, and by him laid upon the Altar. Which being done the Archbishop and Bishops will divest themselves of their Copes, and leave them there, proceeding in their usual Habits.

Then Her Majesty will proceed through the Choir to the West Door of the Abbey, in the same manner as She came, wearing Her Crown, and bearing in Her Right Hand the Sceptre with the Cross, and in Her left the Orb; all Peers wearing their Coronets, and the Archbishops and Bishops their Caps.

Finis (c).

(c) Earl Beauchamp printed for the Roxburghe Club in 1871 the *Liber Regalis* from the MS. in the possession of the Dean of Westminster. The date appears to be uncertain, but it was before 1380. It is entitled,—

*Liber Regalis
seu*

Ordo Consecrandi Regem Solum.

*Ordo Consecrandi Reginam cum
Rege.*

Ordo Consecrandi Reginam Solam.

Rubrica de Regis Exequiis.

The editor observes: "The *Liber Regalis* does not appear to have been written as the order of Coronation of any one king in par-

ticular; but to be a copy from an office of the fourteenth century, with special rubrics applicable to the Coronation of Kings in Westminster Abbey, and transcribed for the use of the celebrant or master of the ceremonies."

The editor also observes: "It is worth noting that the outward form of consecration in England remained essentially unaltered from the time of Ethelred to that of George IV."

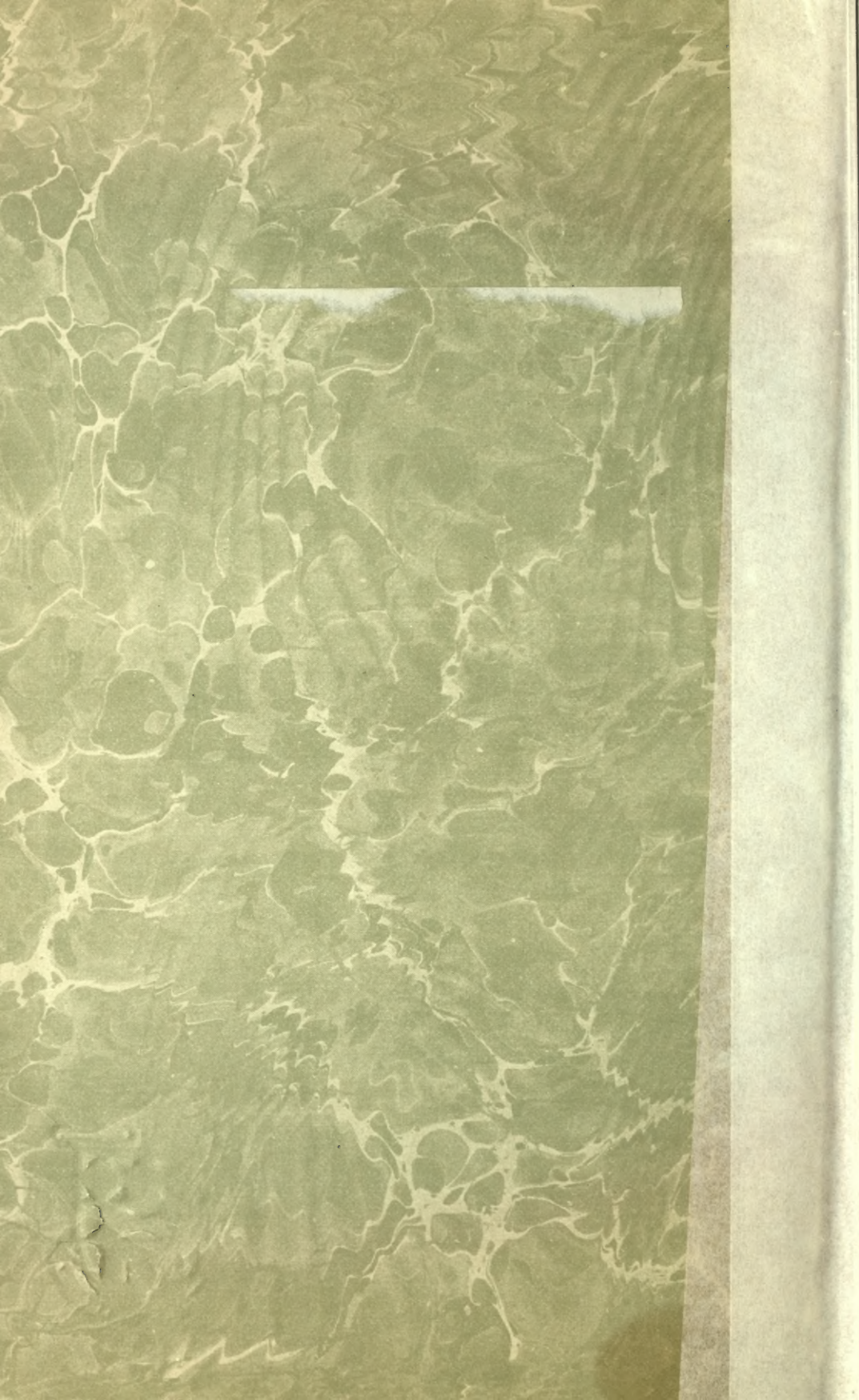
The Manner of the Coronation of King Charles I. has been printed for the Henry Bradshaw Society, under the editorship of the Rev. Christopher Wordsworth, 1892.

2 vols.

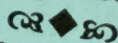
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